# United States Court of Appeals for the Second Circuit



# APPELLANT'S BRIEF

In The

nited States Court of Appeals

For The Second Circuit

FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co. Inc. who are similarly situated,

Plaintiff-Appellant,

- against -

W.J. KANE, H.J. BERRY, R.M. BROWN, JR., W. CORBUS, D.K. DAVID, H.C. GILLESPIE, J.S. KROH, E.A. LE PAGE, R.F. LONGACRE, M.D. POTTS, J.M. SCHIFF, P.A. SMITH, H. TAYLOR, JR., E.J. TONER, W.I. WALSH, N.F. WHITTAKER, J.A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and GREAT ATLANTIC & PACIFIC TEA CO., INC., and C.G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

#### BRIEF ON BEHALF OF PLAINTIFF- APPELLANT

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#### IN THE

#### UNITED STATES COURT OF APPEALS

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FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic Pacific Tea Co. Inc., who are similarly situated.

Plaintiff-Appellant,

#### -against-

W.J. KANE, H.J. BERRY, R.M. BROWN, JR., W. CORBUS, D.K. DAVID, H.C. GILLESPIE, J.S. KROH, E.A. LE PAGE, R.F. LONGACRE, M.D. POTTS, J.M. SCHIFF, P.A. SMITH, H. TAYLOR, JR., E.J. TONER, W.I. WALSH, N.F. WHITTAKER, J. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.), and GREAT ATLANTIC & PACIFIC TEA CO., INC. and C.G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER PEABODY & CO.,

Defendants-Appellees,

RACHEL C. CARPENTER.

Appellant.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the complaint in this action state a claim upon which relief could be granted under the federal securities law?

(The court below held that the complaint could be construed as asserting a claim under the federal securities law, but refused to consider this claim.)

2. Were defendants excused from their contractual obligation to tendering shareholders under the doctrine of impossibility of performance?

(Answered in the affirmative by the court below.)

3. Were defendants excused from their contractual obligations to tendering shareholders under the doctrine of illegality of contract?

(The court below held that this case was one of impossibility, not illegality, and excused defendants under the doctrine of impossibility.)

4. Did the tendering shareholders suffer damages "cognizable at law"?

(Answered in the negative by the court below.)

5. Did the court below err in finding that the defendants did not do anything other than deal fairly with plaintiff and the class?

(Answered in the negative by the court below.)

6. Did the court below err in granting summary judgment in favor of the defendants?

(Answered in the negative in the court below.)

7. Did the court below err in refusing to grant summary judgment in favor of plaintiff?

(Answered in the negative by the court below.)

# PRELIMINARY STATEMENT

This is an appeal from a judgment of the United
States District Court for the Southern District of New
York (Duffy, J.) granting summary judgment in favor of
defendants and denying plaintiff's cross-motion for
summary judgment (214a-216a).\* The judgment entered by
the court below also declared plaintiff to be the representative of the class on whose behalf the action
was instituted and directed the giving of notice. Notice
has been given as directed and the class action determination of the judgment below is not a subject of this
appeal. The decision of the court below on the motion

<sup>\*</sup> References are to pages in the Joint Appendix filed in this Appeal unless otherwise indicated.

and cross-motion for summary judgment is officially reported at 367 F. Supp. 911 (S.D.N.Y. 1973), and appears at Page 83a of the Joint Appendix. The decision of the court below on plaintiff's motion for reargument is not officially reported but appears at Page 133a of the Joint Appendix.

#### STATEMENT OF FACTS

On February 1, 1973, defendant Gulf & Western Industries, Inc. (hereafter "G & W") announced that it was making a tender offer for 3,750,000 shares of the common stock of The Great Atlantic & Pacific Tea Company (hereafter "A & P") at the price of \$20.00 per share. The next day, February 2, 1973, the formal tender offer was published in financial newspapers such as the Wall Street Journal and the financial sections of general newspapers such as the New York Times (17a).\*

The formal tender offer set forth in detail the conditions of the offer and the manner of tendering the stock, including a prescribed form for use in tendering stock (17a-5, 17a-6). The only condition which

<sup>\*</sup> The full tender offer as it appeared in the newspapers is reproduced at pages 17a through 17a-6 of the Joint Appendix.

G & W attached to the offer was the right to reject, on a pro-rata basis, shares tendered in excess of 3,750,000 shares (Paragraph 1 of Tender Offer, 17a). Significantly there was no provision in the tender offer relieving G & W from liability for shares tendered should litigation be instituted against the tender offer. (This type of provision will be referred to in this Brief as a "litigation out" provision. There was no "litigation out" provision in the G & W tender offer).

The individual named as plaintiff in this action,
Fred Lowenschuss, is an attorney actively engaged in
the practice of law in Philadelphia, Pennsylvania. The
name of his firm is Fred Lowenschuss Associates. The
firm has established a trust known as the Fred Lowenschuss
Associates Pension Plan to provide pension benefits for
employees of the firm, and Mr. Lowenschuss is the trustee
of that trust (109a-110a). On the morning of February
2, 1973, Mr. Lowenschuss determined to purchase on behalf of the Pension Plan 2,000 shares of A & P stock
for the purpose of tendering this stock in response to
the G & W tender offer (111a-112a). At that time A & P

per share. Orders were immediately placed for the stock, and 600 shares were purchased at 18 5/8 per share and 1400 shares were purchased at 18 3/8 per share. With commissions, the total investment by the Fred Lowenschuss Associates Pension Plan was \$37,289.60 (114a-115a).

After Mr. Lowenschuss had placed his order for the A & P stock, there came over the ticker tape an announcement by the A & P management that it was opposing the tender offer (115a). (In a subsequently published statement, Mr. W. J. Kane, Chairman of the Board of A & P, stated that the acquisition of A & P stock by G & W raised serious questions with respect to the antitrust laws.\*) Immediately upon hearing of the A & P announcement, Mr. Lowenschuss tried to cancel his order for the 2,000 shares of A & P stock. However, it was too late, as the order already had been consummated to the extent of 600 shares (115a). He then again checked the terms of the G & W tender offer and, since it did not contain any "litigation out" provision, Mr. Lowenschuss con-

<sup>\*</sup> Mr. Kane's statement is set forth in <u>Gulf & Western</u> Indus. inc. v. <u>Great A & P Tea Co. Inc.</u>, 356 F. Supp 1066, 1070 (S.D.N.Y. 1973).

cluded that the Pension Plan would be protected in tendering the A & P stock even if there were litigation over the tender offer (114a-115a).

Litigation over the tender offer did ensue. On February 5, 1973, G & W instituted suit in the Southern District of New York against A & P claiming that statements made by the A & P management in opposing the tender offer were false and misleading in violation of Sections 10(b), 14(d) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b), 78n(d) and 78 n (e). A & P counterclaimed charging that the acquisition by G & W of A & P stock was in violation of the antitrust laws and that various statements made by G & W in the tender offer were misleading in violation of §§14(d) and 14(e) of the Securities Exchange Act of 1934. A & P also filed a third-party action against C.G. Bluhdorn, Chairman of the Board of G & W and Kidder, Peabody & Co., Inc., the broker-manager for G & W on the tender offer. Included in the relief sought by A & P was an injunction against consummation of the tender offer.

Proceedings in the litigation between G & W and A & P were expedited. Several depositions were immediately taken and the case submitted to the Honorable Kevin T. Duffy for determination as to whether a preliminary injunction should issue. On February 13, 1974, Judge Duffy filed his decision in which he found in favor of A & P and entered a preliminary injunction enjoining consummation of the tender offer. See Gulf & Western Industries, Inc. v. Great A & P Tea Co., Inc., 356 F. Supp. 1066 (S.D.N.Y. 1973). G & W immediately appealed Judge Duffy's decision, and like the original proceeding, the appeal also was expedited. On March 12, 1973, this Court filed its decision affirming Judge Duffy's granting of the preliminary injunction. See Gulf & Western Industries, Inc. v. Great A & P Tea Co. Inc., 476 F.2d 687 (2nd Cir. 1973). (Hereafter, this litigation will be referred to simply as G & W v. A & P.)

The factual basis on which Judge Duffy, and subsequently this Court, held that a preliminary injunction against consummation of the tender offer should issue included the following facts developed at the depositions of the various witnesses: Prior to making the tender offer G & W had acquired secretly, in "street name" through Kidder Peabody & Co., a total of 1,045,000 shares of A & P common stock. This constituted approximately 4.7% of the total outstanding common shares of A & P, see 356 F. Supp. at 1069. The additional 3,750,000 shares which were the subject of the tender offer constituted approximately 15% of the total outstanding shares of A & P, see 476 F.2d at 690, so that if the tender offer were consummated, G & W would end up owning close to 20% of the outstanding stock of A & P.

C. G. Bluhdorn is the Chairman of the Board and Chief Executive Officer of G & W, and the "guiding genius" of G & W, see 356 F. Supp. at 1068. At the time the tender offer was made, Mr. Bluhdorn also was the largest single shareholder in Bohack Corporation. Bohack is the second largest operator of retail supermarkets in the New York area, with A & P being the largest, see 476 F.2d at 690-691. During the period immediately prior to the making of the tender offer, Bluhdorn and three other officers of G & W were members of the Board of Directors of Bohack so that, as this

Court held, "Bluhdorn clearly had effective control of Bohack," see 476 F.2d at 687. At the time that the tender offer was made, Bluhdorn placed all his shares of Bohack in a voting trust which was to become effective on consummation of the tender offer, with his shares in Bohack to be sold one year thereafter, see 476 F.2d at 687.

Much of the stock of A & P is held by the owners of a few large blocks of A & P stock. About one-third of all the A & P stock is held by the John F. Hartford Foundation. Beginning in November of 1972, Bluhdorn attempted to purchase all or part of the Hartford Foundation's A & P stock privately but was unsuccessful, see 356 F. Supp. at 1069.

During the period immediately prior to the making of the tender offer, the competitive situation between Bohack and A & P was quite intense. A & P had introduced a discounting program known as WEO which was undercutting the prices of its competitors, including Bohack.

The situation was so intense that the President of Bohack publicly urged businessmen "threatened by A & P to stand up and make themselves heard," see 356 F. Supp.

at 1068-10 y.

On the basis of the foregoing facts, as well as others more fully set forth in the respective opinions, both Judge Duffy and this Court concluded that there was a substantial question presented as to whether G & W's acquisition of such a large block of A & P stock was reasonably likely to lessen competition between Bohack and A & P, and, moreover, particularly in view of G & W's past history of acquisitions, there was a substantial likelihood that G & W would ultimately seek control of A & P, see 476 F.2d at 693-694. This warranted the conclusion that A & P's antitrust claims had a sufficient "likelihood of success" to warrant granting a preliminary injunction. In addition, since G & W had stated in the tender offer that it was seeking to acquire the A & P stock only for purposes of investment, and since the tender offer itself did not disclose the factual situation with respect to possible antitrust violation, both Judge Duffy and this Court held that A & P had demonstrated a probability of success on its claims of securities law violations,

see 476 F.2d at 697.

Throughout this Court's opinion in <u>G & W v. A & P</u>, it was emphasized that the granting of an injunction was on a preliminary basis only, and not a final decision on the merits. This Court recognized, in balancing the equities involved in granting a preliminary injunction, that there were several conflicting interests to be considered, including that of the tendering A & P share-holders, and that a speedy ultimate determination of the merits of the litigation was desirable. Thus, this Court concluded its opinion with the following suggestion to the District Court, see 476 F.2d at 699:

"Under all the circumstances, we suggest to the District Court that it expedite further proceedings in this case, as it so commendably has done to date, with a view to the earliest possible date for trial on the merits consistent with the rights of the parties." (Emphasis supplied)

As will be more fully set forth in this brief, this suggestion was not followed. There never was a trial on the merits, and what ensued was a deliberate and calculated course of conduct by G & W and its counsel to withdraw from the  $G \& W \lor A \& P$  litigation to the

prejudice of the tendering shareholders.

The instant action was instituted in the United States District Court for the Eastern District of Pennsylvania on February 15, 1973, following Judge Duffy's original decision enjoining consummation of the tender offer (8a). It was brought as a class action on behalf of all A & P shareholders who had tendered their stock in response to the tender offer. The complaint asserted claims under the securities laws and for breach of contract, and sought damages and consummation of the tender offer (8a, 15a). At that point in time, with the appeal in <u>G & W v. A & P</u> pending, plaintiff named as defendants G & W, Bluhdorn, Kidder Peabody & Co., A & P and the officers and directors of A & P.

On March 16, 1973, shortly after the institution of suit, plaintiff filed a motion for class certification with the District Court for the Eastern District of Pennsylvania. Mr. Lowenschuss also filed a brief amicus curia in the <u>G & W v. A & P</u> appeal urging consummation of the tender offer (51a). Before the court in the Eastern District of Pennsylvania could act on plaintiff's

motion for class determination, counsel for A & P moved to transfer the action to the Southern District of New York on the grounds that the <u>G & W v. A & P litigation</u> already was pending there, and that plaintiff's action should be heard by the same court. This motion was granted on March 30, 1973, and the case transferred to the Southern District of New York.

Thereafter, on April 2, 1973, plaintiff filed a motion with Judge Duffy to intervene in the  $\underline{G \& W} \lor$ . A & P action which this Court had remanded to Judge Duffy, supposedly for a speedy trial on the merits.

Both G & W and A & P opposed plaintiff's intervention in the  $G \& W \lor A \& P$  suit. No action was taken by Judge Duffy on plaintiff's motion to intervene at that time. Rather, on May 29, 1973, counsel for G & W and A & P entered into a stipulation, subsequently renewed, staying proceedings in the  $G \& W \lor A \& P$  litigation for a period of 45 days. This stipulation was "So Ordered" by Judge Duffy with no notice to plaintiff, whose motion to intervene was still pending, and with no opportunity for plaintiff to object to the delay in

the trial of the G & W v. A & P action.

The file in the instant case was physically transferred from the Eastern District of Pennsylvania to the Southern District of New York on May 7, 1973. On June 14, 1973, defendants G & W and Bluhdorn filed a motion to dismiss the plaintiff's complaint (18a). Similar motions were filed shortly thereafter by A & P and Kidder Peabody & Co. (65a, 66a). Plaintiff then filed a cross-motion for summary judgment against G & W, Bluhdorn and Kidder Peabody and Co. (70a), and agreed to dismiss as against A & P and the officers and directors of A & P (81a). The dismissal of A & P and the officers and directors of A & P was deemed appropriate in view of this Court's affirmance of the preliminary injunction in G & W v. A & P, which came after this suit had been instituted.

At the time of the filing of plaintiff's crossmotion for summary judgment, counsel for plaintiff requested Judge Duffy to grant oral argument of the motion
and cross-motion. No response was ever received to
this request and oral argument was not granted. Instead, on July 25, 1973, Judge Duffy filed an opinion

in which he (1) held that the action was properly maintainable as a class action and that plaintiff was an adequate representative of the class, (2) denied plaintiff's cross-motion for summary judgment, (3) granted summary judgment in favor of defendants against the class, and (4) ordered plaintiff to bear the cost of giving notice to the class that they had lost the action which, up to then, they did not even know was pending (83a-99a).

Judge Duffy granted summary judgment to the defendants on the theory that they were excused from performing the tender offer on grounds of "impossibility" (94a). This "impossibility", according to Judge Duffy, arose from the preliminary injunction against consummation of the tender offer (94a). Judge Duffy further held that this "impossibility" was not the fault of G & W, but, rather, was the result of the action brought by A & P and that, at least insofar as the preliminary injunction was based on antitrust violations, it was not the fault of anyone but rather the result of a "juxta-postion of facts" not intentionally incurred (93a-94a). Judge Duffy also held that the plaintiff and the members

of the class had suffered no damages "cognizable at law", although admitting that this point had neither been briefed nor argued by the parties (96a-97a). Judge Duffy rejected the plaintiff's contention that if there was any "impossibility" or "illegality" involved, it stemmed from G & W's own illegal acts and thus did not present a valid basis for defense. Judge Duffy further refused to consider plaintiff's claims under the securities laws, holding that the action sounded only in contract (87a-88a). With respect to the securities laws claims, Judge Duffy held that these should be resolved in another action which had been brought by plaintiff in the Eastern District of Pennsylvania and also transferred to the Southern District of New York (88a). second action (which will be referred to herein as Lowenschuss II, with the present action being referred to as Lowenschuss 1) was brought on behalf of those shareholders who had acquired their A & P stock during the period from February 1, 1973 to March 13, 1973 -- a different class than that specified in the instant case.

In the course of his opinion, Judge Duffy commented that at no time had plaintiff or any member of the class attempted to intervene in the  $G \in W \lor A \in P$  action before him (87a), notwithstanding the fact that plaintiff had filed a motion to intervene with Judge Duffy on April 2, 1973, which Judge Duffy had not acted upon. Judge Duffy also went out of his way to suggest, in footnote 1 to his opinion, that the Pennsylvania Bar should investigate whether plaintiff, an attorney, had purchased stock in A & P as an investment for his pension plan or as a vehicle for this litigation in which counsel fees were being sought (98a). While Judge Duffy refrained from making any finding as to whether plaintiff purchased the A & P stock before or after A & P announced its opposition to the tender offer (86a), in point of fact, as previously set forth, the stock had been purchased prior to the A & P announcement. Unfortunately, for reasons unknown to plaintiff, Judge Duffy did not seek to ascertain what the facts were prior to writing his opinion, and had denied oral argument where the facts could easily have been made known to him if there was any question in his mind.

To Mr. Lowenschuss, as a practicing attorney, the suggestion in a judicial opinion given wide publication through the West Reporting System, that he may have engaged in improper conduct was a matter of the utmost seriousness, and he immediately instituted steps to bring to Judge Duffy's attention the true facts with respect to the purchase of the A & P stock. A letter was immediately dispatched to Judge Duffy requesting that dissemination of the opinion, with its damaging footnote 1, be withheld until plaintiff had the opportunity to file an affidavit setting forth the facts as to his acquisition of the A & P stock and a motion for reargument (100a-102a). In the meantime, counsel for G & W had submitted a proposed order to Judge Duffy. Counsel for plaintiff then requested that the signing of any order be withheld until after the motion for reargument was determined. Judge Duffy initially agreed to this, but this agreement became lost in the considerable confusion over the entering of orders which subsequently ensued.

Plaintiff's motion for reargument was filed on

August 3, 1973 (103a). Submitted with the motion were affidavits establishing that plaintiff had purchased his A & P stock prior to the announcement by the A & P management that it was opposing the tender offer (106a-107a). The motion for reargument raised several other issues, including, inter alia, that it was improper to grant summary judgment against the class when the class had not even been notified. Oral argument on the motion for reargument was requested, but this request was not granted. On August 23, 1973, Judge Duffy filed an Endorsement Opinion denying plaintiff's motion for reargument (133a). In this opinion, Judge Duffy criticized the plaintiff for taking "a great deal of this Court's time seeking the removal of footnote 1 from the opinion" and stated that he was not condemning the plaintiff but merely trying to "awaken" the Bar to make its own findings (133a). Why the vehicle of a widely disseminated opinion written without even affording Mr. Lowenschuss the opportunity to explain the circumstances under which the stock had been acquired was chosen as the vehicle for "awakening" the Bar was not explained. However,

the Disciplinary Committee of the Pennsylvania Bar Association did investigate plaintiff's conduct in this matter and concluded that he had not engaged in any improper conduct (135a).

In addition to refusing to consider plaintiff's request that footnote 1 be eliminated from the opinion, Judge Duffy went even further in his unwarranted criticism of the plaintiff, for he then proceeded to condemn the plaintiff for not bringing the class action aspects of the case to his attention at the time of the filing of the motion for summary judgment (133a), completely ignoring (1) that it was the defendants who had first moved for judgment, (2) that plaintiff had filed his motion for class determination back in March of 1973, long prior to the filing of the motion for summary judgment, but that the Court had not acted on it, and (3) that if the oral argument which counsel for plaintiff had requested had been granted, matters such as this could easily have been brought to Judge Duffy's attention.

Judge Duffy denied plaintiff's motion for reargument

but stated that he would be willing to hear from other members of the class and directed plaintiff to give notice of his initial decision to the members of the class within <u>five</u> days, with that notice to state that any member of the class wishing to seek a redetermination of his decision could do so within 20 days of the date of the decision, i.e., 20 days from August 23, 1973 (134a).

The decision on the motion for reargument was "So Ordered", so that, at that point in time, there was an order entered on the motion for reargument without an order having been entered on the original motion. Moreover, it was physically impossible for plaintiff to send out notice to the members of the class within five days. In view of Judge Duffy's manifestly critical attitude toward Mr. Lowenschuss, it immediately became apparent that plaintiff would have to take all steps necessary to protect the record for appeal while avoiding any possibility of being held in contempt of Judge Duffy's order with respect to sending out notice in five days. Accordingly, a notice of appeal from the

order of August 23, 1973 was filed (136a), and a motion for a stay of that order (insofar as it related to the giving of notice) was brought on by order to show cause (137a).

Oral argument on the application for a stay was held on September 5, 1973 (142a-154a), at which time Judge Duffy withdrew the direction to give notice within five days. The September 5, 1973, hearing was concluded with Judge Duffy taking the matter under advisement and with the parties to submit proposed orders to him (154a).

The next event which occurred was that on September 26, 1973, Judge Duffy signed and filed three orders, one in the instant case and two in the  $G \& W \lor A \& P$  action. The order filed in the instant action was one granting summary judgment in favor of the defendants and against the plaintiff in the form originally submitted by counsel for G & W and Bluhdorn following the July 25 decision prior to plaintiff's motion for reargument. This order was dated August 13, 1973, although not entered until September 26, 1973 (155a-156a). The two orders in the  $G \& W \lor A \& P$  action respectively

(1) approved the settlement of the  $G \& W \lor V$ . A & P action with an agreement by G & W not to seek to acquire A & P stock, and (2) denied plaintiff's pending motion to intervene therein as being moot. Thus, plaintiff was never given the opportunity by Judge Duffy to participate in the  $G \& W \lor V$ . A & P litigation, and that litigation never proceeded to the speedy trial on the merits which this Court had suggested as being necessary.

August 13, 1973, althought not filed until September 26, 1973, counsel for plaintiff inquired of Judge Duffy's chambers as to whether there had been any mistake in the filing of the order. He was advised that there was no mistake. Since the order was clearly a final order, the plaintiff filed a notice of appeal therefrom on October 5, 1973 (159a) and the record on appeal was transmitted to this Court on November 12, 1973.

In addition, plaintiff also appealed the approval of the settlement of the  $\underline{G \& W} \lor \underline{A \& P}$  action and the denial of his motion to intervene therein.

After plaintiff had filed his notices of appeal

from the September 26, 1973 orders, counsel for G & W and Bluhdorn submitted a new proposed order to Judge Duffy which Judge Duffy, signed on November 12, 1973 (161a), at a time when the record on appeal already had been transmitted to this Court. Plaintiff thereupon moved before Judge Duffy to strike the order of November 12. 1973, as being beyond his jurisdiction because of the pendency of the appeal (167a). Argument was heard on this motion on December 4, 1973, and it was taken under advisement by Judge Duffy. Counsel for G & W and A & P then moved in this Court to strike plaintiff's appeals from the various orders of September 26, 1973. Argument on these motions was heard in this Court on January 8, 1974, with the result that plaintiff's appeals from the orders in the G & W v. A & P litigation were dismissed, presumably on the grounds that plaintiff had an adequate remedy in the instant action, and the appeal in the instant action was remanded for whatever action Judge Duffy might take (182a).

On remand, plaintiff moved (1) to vacate Judge

Duffy's original decision in the instant case on

grounds of change in circumstances arising from the settlement of the  $G \& W \lor A \& P$  litigation, there now being no injunction against consumation of the tender offer but rather a voluntary agreement by G & W not to acquire A & P stock, and (2) to remand the case to the Eastern District of Pennsylvania on the grounds that the reason for the action having been originally transferred to the Southern District of New York was the pendency there of the  $G \& W \lor A \& P$  litigation which now had terminated (194a). This motion was summarily denied in all respects without opinion (212a).

Finally, on May 9, 1974, Judge Duffy filed the order which is the subject of this appeal (214a). That order granted summary judgment to defendants, denied plaintiff's motion for summary judgment, designated plaintiff as the representative of the class of tendering shareholders, directed the giving of notice, provided that members of the class who wish to seek a redetermination of the decision could do so by filing briefs with the court no later than July 26, 1974, and that, if no such application was made, the order

would become a final order 15 days thereafter. Plaintiff complied with this order by giving notice to the members of the class. No member of the class filed an application for redetermination of the decision, although one tendering shareholder of a large block of stock, Rachel C. Carpenter, has appeared and is participating in this appeal.

<sup>\*</sup> Several tendering shareholders did contact plaintiff and indicated their support for this action.

## **ARGUME NT**

## POINT I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

A. A Genuine Issue of Fact Requiring Denial of a Motion for Summary Judgment May Exist Even Though the Parties Have Brought Cross-Motions for Summary Judgment.

In granting summary judgment in favor of the defendants, the Court below violated the basic principle that disputed issues of fact may not be resolved on a motion for summary judgment and that summary judgment must be denied if a genuine issue of fact exists. This principle applies even though the parties may have filed cross-motions for summary judgment, and the fact that the parties have filed cross-motions does not mean that a genuine issue of fact does not exist as to either, or both, motions. Rather, it is necessary that each motion be viewed separately to determine whether there is a genuine issue of fact with respect to the legal theory which it raises. See Hindes v. United States, 326 F.2d 150 (5th Cir. 1964), cert. denied, 377 U.S. 908 (1964); American Fidelity & Casualty Co. v. London & Edinburgh Insurance Co., 354 F.2d 214 (4th Cir. 1965); Walling v.

Richmond Screw Anchor Co., 154 F.2d 780, 784 (2d Cir. 1946), cert. denied 328 U.S. 870 (1946).

In <u>Walling</u> v. <u>Richmond Screw Anchor Company</u>, supra, at 784, this Court stated:

"It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists. As judgment here was on plaintiff's motion, we must therefore decide whether, adopting its legal theory, there was no such dispute."

In the instant case, there were several motions before the lower count: (1) Defendants' motion to dismiss the complaint, which was based primarily on a hybrid theory of illegality of contract and impossibility of performance and which virtually ignored plaintiff's claim based on violations of the federal securities laws; and (2) plaintiff's cross-motion for summary judgment on the issue of liability, which motion was based on plaintiff's dual claims of violation of the federal

T. "So, too, may the plaintiff show on defendant's motion."

securities laws and breach of contract under State law.

The lower court failed to view each motion separately to determine whether, under the legal theories reised, there were material issues of fact outstanding. On the contrary, it would appear that the lower court erroneously assumed that, because both sides filed motions for judgment, there were no outstanding issues of fact.\* The court below also went further and actually made findings of fact which were contrary to the record. This Court, on appeal, is not bound by these findings, as the decision below was based merely on affidavits and no evidentiary hearing was held. As this Court stated in S.E.C. v. Spectrum, Ltd., 489 F.2d 535, 540-541 (2d Cir. 1973):

"...It is especially as to this latter holding, the declination to hold an evidentiary hearing, that we find error

<sup>\*</sup> In the Memorandum Endorsement denying the plaintiff's motion for reargument, the court below stated:

<sup>&</sup>quot;I did rely on the plaintiff's motion for summary judgment to mean that I could make the determination which I did" (133a).

for we believe that the district judge failed to properly heed our admonition that 'a judge should not resolve a factual dispute on affidavits or depositions, for then he is merely showing a preference for one piece of paper to another. Sims v. Greene, 161 F.2d 87, 88 (3rd Cir. 1947).' Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2nd Cir. 1972).

"As in Dopp, we need give no special deference to the district court's finding that there were no material issues of fact in dispute for 'we are in as good a position as (he) to read and interpret the pleadings, affidavits and depositions...' Ibid...

"...Accordingly, since oral testimony is a medium far superior for evaluating credibility than the cold written word, we consider an evidentiary hearing essential to the proper disposition of this case. See S.E.C. v. Frank, 388 F.2d 486 (2nd Cir. 1968)."

In Points I through V of this Argument we shall consider the defendants' motions and demonstrate how these motions raised disputed issues of fact which should have precluded the granting of summary judgment to defendants. Our discussion of plaintiff's crossmotion will be reserved for Point VI of this Argument so as to properly separate the issues raised by the respective motions.

B. The Court Below Not Only Ignored the Existence of Disputed Issues of Fact, But Made Findings Contrary to the Facts of Record and Improperly Construed Facts and Inferences Against the Plaintiff.

It is, of course, fundamental that, on a motion for summary judgment, the facts set forth in the pleadings, affidavits, and other parts of the record, and all inferences to be drawn therefrom, must be construed in the light most favorable to the party opposing the motion. United States v. Diebold, 369 U.S. 654 (1962); Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2nd Cir. 1962). Furthermore, the party moving for summary dismissal or summary judgment has the burden of showing the absence of a genuine issue as to any material fact, and for these purposes, material lodged by them must be viewed in a light most favorable to the opposing party. First National Bank of Cincinnati v. Pepper, 454 F.2d 626 (2d Cir. 1972).

The lower court, in granting defendants' motion for summary judgment and dismissing the complaint, acted in direct contravention of these well-established principles. The court below not only ignored disputed issues

of fact which should have precluded summary dismissal of the complaint, but, even worse, it made unsupported findings of fact that were clearly contrary to the established facts of record, and it repeatedly construed facts and the inferences to be drawn therefrom in the light least favorable to the plaintiff, and most favorable to the defendants, instead of in the plaintiff's favor.

The District Court based its dismissal of the complaint upon the following four holdings, each of which was erroneous in fact, as well as a matter of law:

- The District Court refused to consider plaintiff's claims under the federal securities law, and held that the complaint sounded only in contract.
- 2. The District Court determined that the defendants were excused from their contractual obligations, under the doctrine of "impossibility of performance", by reason of the preliminary injunction against consummation of the tender offer.
- The District Court determined that "there is no evidence that the defendants have done anything

other than deal fairly with the plaintiff and the class he represents."

4. The District Court held that "plaintiff and the class he represents have suffered no damage cognizable at law."

These erroreous determinations, which were made by the court below without an evidentiary hearing and without permitting any oral argument by counsel, will be discussed in detail in the subsequent Points of this Argument.

## POINT II

THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER PLAINTIFF'S CLAIMS BASED ON VIOLATIONS OF THE FEDERAL SECURITIES LAWS

A. Plaintiff's Complaint States a Claim Upon Which Relief Can Be Granted Under the Federal Securities Laws.

It is patently clear and prominent on the face of plaintiff's complaint that plaintiff's claim for relief is based on violations of the federal securities laws, as well as upon breach of contract. If the federal law of "notice pleading" has any meaning at all, one must conclude that plaintiff's complaint could not have given more overwhelming notice of the federal securities law claims.

To begin with, the caption of the complaint itself spells out the basis for the action in capital letters: "CLASS ACTION - SECURITIES ACT OF 1933 - SECURITIES ACT OF 1934...." (8a).

Furthermore, the very jurisdiction of the federal district court is founded upon plaintiff's claims under the federal securities laws. This is clearly spelled

out in paragraph 8 of the complaint, which states:
"This Court's jurisdiction of this action is based on
the Securities Act of 1933, the Securities Exchange Act
of 1934, the rules and regulations promulgated thereunder by the Securities Exchange Commission." (9a)

The body of the complaint then proceeds to allege violations of various provisions of the federal securities laws. For example, paragraph 14(d) and 14(e) of the complaint set forth questions involving Securities Exchange Act violations and paraphrase the provisions of Section 14(d) and Section 14(e) of the Securities Exchange Act. (11a). Paragraphs 22 and 23 of the complaint (13a) also relate to Sections 14(d) and 14(e) of the Securities Exchange Act. In these paragraphs, the complaint specifically raised the issue of whether defendants G & W, Bluhdorn and Kidder, Peabody had improperly prepared the tender offer and whether these defendants engaged in any act which oper led or tended to operate as a fraud or deceit upon the plaintiff class in connection with the making of the tender offer.

Under the theory of "notice pleading", the fore-

going allegations sufficiently set forth plaintiff's claim under the federal securities laws. The Federal Rule of Civil Procedure 8(a)(2) simply requires that a complaint set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." There is no requirement that the pleading state "facts sufficient to constitute a cause of action," since it is the purpose of the Rules to avoid needless controversy over matters of form. 3 Moore, Federal Practice, Paragraph 8.13, pp. 1692-95.

The Courts have recognized that the function of pleadings under the Federal Rules is to give <u>fair notice</u> of the claim asserted, so as to enable the adverse party to answer and prepare for trial, to allow for the doctrine of res judicata, and to show the type of case brought so that it may be assigned to the proper form of trial. 3 Moore, Federal Practice, paragraph 8.13, pp, 1695.

In <u>Connolly</u> v. <u>Gibson</u>, 355 U.S. 41,47 (1957),

Justice Black stated for a unanimous Court, "all the

Rules require is a 'short and plain statement of the

claim' that will give the defendants fair notice of

what the plaintiff's claim is and the grounds upon which it rests." See also, Minkoff v. Stevens, Jrs., Inc., 260 F.2d 588 (2nd Cir. 1958); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

There can be no doubt that the plaintiff's complaint gives fair notice of a claim under the Williams Act, section 14(e) of the Securities Exchange Act of 1934. In fact, the lower Court itself recognized that the complaint "could be construed as including the Williams Act claims." Footnote 2 of the District Court's opinion (98a). However, the District Court refused to consider such claims, stating that, "This case sounds only in contract." (87a-88a). It did not "sound only in contract," and it was error for the court below to so construe it.

R. This Court Previously Found a Probability
That Defendants G & W and Bluhdorn Violated
the Williams Act in Making the Tender Offer

The Williams Act, Section 14(e) of the Securities

Exchange Act of 1934, makes it unlawful "for any person"

in connection with a tender offer to make any untrue

statements of material facts or to omit to state any

material fact necessary in order to make any statement made, in light of the circumstances under which they are made, not misleading. 15 U.S.C. Section 78n(e). Under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa, the federal courts have jurisdiction to grant a civil remedy including damages, for violations of section 14(e). See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Chris Craft Industries Inc. v. Piper Aircraft Corp., 480 F.2d 341, 362 (2nd Cir. 1973).

Furthermore, Section 14(d) requires the filing and publishing of a statement containing the information required by Schedule 13-d, promulgated by the Securities Exchange Commission (17 C.F.R. 240.13(d) - 101). Item 4 in Schedule 13-D requires a statement of the "purpose of transaction." In <u>G & W v. A & P</u>, supra, this Court indicated that G & W had failed to comply with these requirements and that there was a reasonable probability that G & W and Bluhdorn had violated the Williams Act. This Court stated, 476 F.2d at 695-697:

"A & P claims that G & W has violated

section 14(e) of the Securities Exchange Act of 1934 by omitting certain material facts from its tender offer announcement: (1) G & W's intention to acquire a controlling position in A & P or at least to exercise influence over A & P's management and policies; and (2) G & W's holdings in other companies which indicate that G & W's acquisition of A & P stock is likely to result in violations of the antitrust laws by both companies... We hold that A & P has demonstrated a probability of success on the merits with regard to its §14(e) claim.

"There can be no doubt that if G & W intended, when it announced its tender offer, to take control of A & P or to participate extensively in its management, its failure to disclose that intention constituted a violation of §14(e)....

"Considerable evidence was adduced at the hearing which indicates that G & W purchased A & P stock not for the purpose of investment but with a view to exercising influence or control...G & W has a well-established practice of eventually acquiring firms in which it initially purchased only a small percentage of the outstanding shares. It is likely that this acquisition practice will be applied to A & P, especially since G & W's present committment to purchase A & P shares represents the largest single committment in G & W's history. In addition, A & P is such an 'overpriced' and 'rundown' corporation, in the opinion of Bluhdorn, that it could not possibly succeed as an 'investment'. But since in Bluhdorn's view much of A & P's difficulty is attributable to its present management, it is the type of company that would probably make a sound acquisition with a replacement

of management. Bluhdorn indeed remarked that his 'Bohack management team' possessed the skills and experience necessary to cause a turnaround of A & P. These facts and circumstances indicate that A & P has a probability of success in proving at trial that G & W had an intention to obtain control of A & P or to influence substantially its management, which intentions it failed to disclose in violation of §14(e).

"It also appears that G & W omitted to state certain material facts indicating that there are substantial antitrust obstacles to G & W's purchasing a large portion of A & P's shares. As stated above, Bluhdorn's ownership of a controlling interest in Bohack, combined with G & W's large purchases of A & P stock creates a strong likelihood of antitrust litigation to prevent unlawful foreclosure of competition in the supermarket business. G & W also owns or controls several companies which are actual or potential suppliers of A & P, and apparently has planned to expand such operation so as to take advantage of its shareholder position in A & P. We have discussed above the exposure of G & W to potential antitrust liability for engaging in unlawful vertical integration.

"The fact that, at the time it announced its tender offer, an antitrust action had not been commenced against G & W and that its liability was uncertain, does not excuse G & W's failure to disclose all these relevant circumstances so that A & P shareholders could weigh them in reaching their decision whether or not to tender their shares. As we said in S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2 Cir. 1968) (en banc)...the disclosure requirements of the securities laws require 'nothing more than the disclosure of basic facts so that outsiders may draw upon their

own evaluative experience in reaching their own investment decisions with knowledge equal to that of the insiders.' Those 'basic facts' bearing upon G & W's possible liability for antitrust violations were of obvious concern to those A & P shareholders who retained part of their holdings.

"We hold that the record before the District Court demonstrated the probability of A & P's success on the merits on its claims of securities law violations." (Emphasis Supplied)

C. In Refusing to Consider the Securities Law Claims, the District Court Improperly Required the Plaintiff Class to Split Its Cause of Action.

The court below's sole basis for rejecting the securities law claims was that plaintiff had filed a subsequent action, Lowenschuss II, which also set forth claims under the Williams Act (88a). Because of this, the court below mistakenly concluded that all securities law claims should be considered only in Lowenschuss II, and therefore removed them from the present action.

In so doing, the District Court completely ignored the fact that the present action and Lowenschuss II involve two different classes of plaintiffs. It is not true that the present class, consisting of tendering

A & P shareholders, will have the opportunity to litigate their securities laws claims in the Lowenschuss II action. The Lowenschuss II action has been brought on behalf of a different class, defined as those persons who purchased common shares of stock of A & P during the period from February 1, 1973 to March 13, 1973. It is readily apparent that many members of the class as defined in the instant action are not members of the class as defined in the Lowenschuss II action. As a result, the refusal of the District Court to consider securities law violations in the instant action operates to deprive a large number of the members of the class of tendering A & P shareholders of their right to seek recovery for violations of the securities laws, and thus represents a serious denial of a substantial right of these members of the class.

The lower court, by consigning all securities law claims exclusively to <u>Lowenschuss II</u>, has committed a basic and fundamental error - namely, forcing the tendering A & P shareholders to split their cause of action in violation of Rules 2 and 18(a) of the Federal Rules

of Civil Procedure. Rule 18(a) provides:

"A party asserting a claim to relief...
may join, either as independent or as
alternative claims, as many claims, legal,
equitable, or maritime, as he has against
the opposing party."

In addition, under federal law relating to the doctrine of res judicata, a decision in an action is res judicata not only of the claims that were litigated in the action but which could have been litigated in the action. Thus, if the class of tendering A & P shareholders is denied the opportunity to litigate their claims for violations of the securities laws in the instant action, some other court at some future time may determine that the instant action is res judicata of their claim under the securities laws, even though the claim was never litigated. See, e.g., McConnell v. Travelers Indem. Co., 346 F.2d 219 (5th Cir. 1965). Since, under Rules 2 and 18(a) of the Federal Rules of Civil Procedure, plaintiffs (including a class of plaintiffs) must litigate all their claims in a single action, it was error for the court to split the classes' cause of action between this action and the Lowenschuss II

action.

In an attempt to justify its splitting of the cause of action, the District Court erroneously assumed that the plaintiff had himself construed the present action as sounding only in contract. However, in view of the plaintiff's vigorous assertion of the federal securities law claims in the briefs before the lower court, it is clear that the plaintiff never waived or abandoned any such claims. However, instead of recognizing this fact, the District Court has ironically chided the plaintiff for pressing these claims in plaintiff's brief. Thus, the court below stated:

"Although the plaintiff in his brief switches from claims sounding in contract to those in securities law, without compunction, it is clear to me that the questions before the Court is one solely of contract law." (88a)

This criticism of the plaintiff was both unwarranted and unfair. Plaintiff was not switching from contract law claims to securities law claims; rather, throughout the litigation, he has been pressing his claims under both theories, which is precisely what he is required to do under the Federal Rules of Civil Procedure.

Finally, it is important that the securities law claims and the contract law claims be litigated in the same action to prevent inconsistent and illogical results. Here the defendants' defense to the claim for breach of contract boils down to the premise that they are excused from performing their contracts with the tendering shareholders under the doctrine of illegality. However, it is apparent that if there was any illegality, it stemmed directly from the acts of the defendants. Since these defendants were under a duty prescribed by the Williams Act to disclose all matters necessary to make the tender offer "not misleading," the failure to disclose the circumstances on which they are now relying for the defense of illegality itself constituted a violation of their duty of disclosure under the Williams Act.

In the final analysis, defendants G & W and Bluhdorn have no satisfactory defense to this action, because if they are excused from their breach of contract under the doctrine of illegality, then they must be liable for violations of the Williams Act because of that same illegality. In seeking to split the class's cause of action, defendants are trying to defend the claim on the contract by taking the position that they are excused from contractual liability under the doctrine of illegality, while at the same time reserving the defense that they did not act illegally when it comes time to defend the claim under the Williams Act. Defendants cannot have it both ways. Such a result would be obviously inconsistent and is precisely the type of situation which the rule against splitting a cause of action was designed to prevent.

Accordingly, the court below's refusal to consider the securities laws claims in this action was error and should be reversed. Moreover, these claims raised substantial issues of fact, as was previously recognized by this Court in <u>G & W v. A & P</u>, supra, which held that there was a substantial likelihood that such violations existed. Therefore, it was improper for the district court to dismiss the complaint upon a motion for summary judgment.

D. The Court Below Erred in Dismissing the Complaint Against Defendant Kidder, Peabody & Co. Without An Evidentiary Hearing.

The Court below committed additional error in its dismissal of the complaint against defendant Kidder, Peabody & Co., the "dealer-manager" for the tender offer. The theory on which Kidder, Peabody was sued was that it aided and abetted defendants G & W and Bluhdorn's violation of the Williams Act with respect to the preparation of a false and misleading tender offer. The Court below, after improperly having determined that the complaint sounded only in contract, dismissed the complaint as against Kidder, Peabody because Kidder, Peabody was not a party to the contract (90a). The Court below then stated:

"In any event, there is no showing on the record before me that Kidder, Peabody knowingly and wilfully aided and abetted the violation of the Williams Act or any other statute. In acting as dealer-manager of the tender offer, it is true that Kidder, Peabody transmitted the offer to others. But there is not the slightest scintilla of proof, much less a clear allegation that Kidder, Peabody even knew or had reason to know of any infraction" (90a).

In making the foregoing determination the District

Court not only misstated the law in regard to aiding and abetting, but also ignored the existence of an outstanding issue of material fact which could not properly be determined without an evidentiary hearing. This Court has held that a District Court should not make a determination upon a motion for summary judgment that there is no evidence that a person aided and abetted the violation of the securities laws without an evidentiary hearing. S.L.C. v. Spectrum, Ltd., 489 F.2d 536, 540 (2nd Cir. 1973). See also Hochfelder v. Ernst & Ernst, CCH Fed. Sec. L. Rep. paragraph 94, 781 (7th Cir., Aug. 30. 1974).

As previously noted, the Williams Act applies to "any person" involved in the making of a tender offer, which would include a "dealer-manager" such as Kidder, Peabody.

As this Court recognized in <u>S.E.C.</u> v. <u>Spectrum, Ltd.</u>, supra, the standard of culpability of an aider and abettor does not require actual knowledge of the improper scheme plus an intent to further that scheme, but rather a standard of negligence should be applied. <u>S.E.C.</u> v. <u>Spectrum, Ltd.</u>, supra, 489 F.2d at 541, citing <u>S.E.C.</u>

v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2nd Cir. 1972); Hanly v. S.E.C., 415 F.2d 589, 596 (2nd Cir. 1969); S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 854-855 (2nd Cir. 1968) (en banc), cert. den., sub nom, Kline v. S.E.C., 394 U.S. 976 (1969).

Furthermore, it has been stated that a party may be liable as an aider and abettor, despite his lack of actual knowledge of the violations, if the party breached a duty to inquire into and disclose the underlying facts, and thereby facilitated the commission of the violation.

Hochfelder v. Ernst & Ernst, supra, at page 96, 579.

Paragraph 23 of the complaint in the instant case (13a) clearly alleges that defendant Kidder, Peabody "aided and abetted defendant, Gulf & Western, in the making of said (tender) offer to the general public and said investment firm also warranted to the general public that the actions taken by their client in the tender offer were legal and proper." This allegation sufficiently states a claim upon which relief can be granted, under the doctrine of "notice pleading" as discussed previously in this argument. Accordingly, the District Court erred in granting defendant Kidder, Peabody's motion for summary judgment, and plaintiff's action against defendant Kidder, Peabody should be reinstated.

E. The Plaintiff Class is Entitled to Its Remedy Under the Federal Securities Laws.

This action has been properly brought as a private class action for damages under the Securities Exchange Act of 1934, as well as for breach of contract under State Law. In essence, the Williams Act portion of the Securities Exchange Act was intended to give investors and the general public the same kind of protection with regard to tender offers as was afforded in other kinds of securities transactions.

The United States Supreme Court has permitted and encouraged the institution of private actions for damages under the Securities Exchange Act. In J. I.

Case Co. v. Borak, supra, 377 U.S. at 432, the Supreme Court stated that private actions provide a "necessary supplement" to actions by the Government, and that "the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement" of laws designed to protect the public interest.

This Court has recognized that a person who is a victim of violations of section 14(e) has standing to

to sue for damages. In <u>Chris Craft Industries Inc.</u> v. <u>Piper Aircraft Corp.</u>, supra, this Court stated, 480 F. 2d at 361:

"...we should not be reluctant to imply a private right of action when to do so will further the general objective of the statute involved. We can conceive of no more effective means of furthering the general objective of §14(e) than to grant a victim of a violation of the statute standing to sue for damages."

The defendants have improperly impugned the plaintiff's motives in bringing this action by implying that plaintiff entered into the tender offer merely to make a quick profit, and that therefore the plaintiff's claim is not entitled to serious consideration by the courts. This argument overlooks the fact that G & W's tender offer was designed to encourage persons to tender A & P shares by holding out the expectation that they could make a quick profit in the transaction. Furthermore, the policy of the Securities Exchange Act is to protect all kinds of investors, whether they are seeking a quick profit or a slow profit.

In <u>S.E.C.</u> v. <u>Texas Gulf Sulphur Co.</u>, 401 F. 2d 833 (2d Cir. 1968), <u>cert. denied</u>, 394 U.S. 976 (1969),

this Court firmly rejected the notion that the federal securities laws seek to protect only the long-term conservative investor. In reviewing the District Court's test of materiality, this Court stated, 401 F. 2d at 849:

"The speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders."

The plaintiff, and other members of the plaintiff class who purchased A & P stock in reliance upon the tender offer, did no more than what the defendants actively encouraged and expected when G & W offered a price for the A & P shares which was higher than the market price. The expectation of a profit was merely the inducement offered by defendants in order to obtain the large number of A & P shares they desired, and which they were unable to obtain by other methods. Under the circumstances, no improper motives can be imputed to the plaintiff, who substantially changed his position in reliance upon the defendants promises and misrepresentations.

F. The Defendants Committed Further Violations of the Williams Act by Extending the Tender Offer in Bad Faith When They Had No Intention of Attempting to Consumate it.

Following the District Court's preliminary injunction against consummation of the tender offer on February 13, 1973, the defendants extended the tender offer until February 27, 1973, announcing that they would appeal the preliminary injunction to this Court. Subsequently, the defendants again extended the offer until March 16, 1973, while continuing to hold the tendered shares in their depository. This Court upheld the preliminary injunction on March 12, 1973.

On March 16, 1073, the defendants <u>again</u> extended the tender offer until June 15, 1973. In the wire service release, G & W said that the offer was being extended because the District Court's injunction against consummation of the tender offer continues in effect, and that:

"The extension is designed to allow time for consideration of problems connected with litigation which is still pending between Gulf and Western and A & P. If the litigation problems have not been resolved by the new expiration date, Gulf & Western indicated that it would consider a further extension."

G & W continued to hold the tendered shares in the depository, although it did allow tendering shareholders the option of withdrawing their shares as of March 14, 1973. Throughout this time, the defendants continued to maintain that the tender offer was legal, and they gave no indication that they would not comply with the directions of this Court to "... expedite further proceedings in this case...with a view to the earliest possible date for trial on the merits..." G & W v.

A & P, supra, 476 F. 2d at 699.

G & W's extension of the tender offer during the period following the remand of the case to the District Court was a representation to the tendering shareholders that it intended to take the necessary steps either to cure the defects in the tender offer or to seek to establish the legality of the tender offer through the inter-corporate litigation. However, rather than proceeding on either of these courses, G & W entered into negotiations with A & P to settle the litigation by withdrawing the tender offer, and, in fact was concerned only with how it could do so in a manner which

would defeat the present action of plaintiff and the members of the class.

This is borne out by the fact that, although plaintiff had sought to intervene in the <u>G & W</u> v. <u>A & P</u> litigation, and had requested copies of all papers filed in that action, he was kept in the dark as to what was happening and, without his knowledge, G & W entered into two stipulations extending the time in which that case had to go to trial. During these extensions, rather than proceeding in the inter-corporate litigation, G & W moved to dismiss the plaintiff's complaint. The moment of truth came when, following the District Court's decision of July 25, 1973, dismissing the complaint, G & W immediately revoked the tender offer, which it previously had extended to August 17, 1973.

G & W's true motives were confirmed when, following the dismissal of plaintiff's complaint and the
revocation of the tender offer, its counsel stated to
the press that G & W had determined:

". . . sometime ago to withdraw the offer rather than tie up its capital during a protracted antitrust suit that loomed when

A & P went to court to fight the offer, but G & W felt it couldn't pull out until the Federal District Court here decided a shareholder's suit seeking damages against G & W for failing to pay \$20.00 a share for A & P stock as promised, according to John Guzzetta, Esq., outside lawyer for Gulf & Western." (Quoted from Wall Street Journal of July 28, 1973.)

G & W's failure to disclose the true reasons for the extensions of the tender offer was a clear violation of the Williams Act Section 14(e) of the Securities Exchange Act of 1934, supra.

Section 14(e) incorporates the same restrictions against fraud and deception set forth in section 10(b) of the Securities Exchange Act and Rule 10B-5 promulagated thereunder. 17 C.F.R. section 240, 10B-5; Electronics Specialty Co. v. International Controls Corp., 409 F. 2d 937, 945-46 (2nd Cir. 1969); G & W v. A & P, supra, 476 F. 2d at 695-96.

The Congressional purpose in enacting Section 14(e) of the Securities Exchange Act was to encourage full and complete disclosure of <u>all</u> material facts in the making of cash tender offers. Congress clearly intended this philosophy of full disclosure, which

permeates the entire structure of the federal securities laws, to apply to cash tender offers when it enacted the Williams Act. Senator Williams himself stated, "The purpose of this bill is to require full and fair disclosure for benefit of stockholders while at the same time providing the offeror and management people opportunity to fairly present their case." 113 Cong. Rec. 854-855 (1967); "Cash Tender Offers," 83 Harv. L. Rev. 377 (1969).

This policy is expounded in the following language appearing in the Congressional Record:

"It has been argued that a cash tender offer is a straightforward business proposition which can be rejected or accepted by a shareholder like any other bid for his securities. But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that the present management and its policies will continue.

"The persons seeking control, however, have information about themselves and about their plans which, if known, to investors might substantially change the assumptions on which the market price is based. This bill (the Williams Bill) is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." (S. Rep. No. 55, Rep. No. 1711,

90th Cong., 2d Sess., 2 1968 U.S. Code Cong. & Admin. News at 2813; (emphasis supplied.))

In the case of <u>Walling</u> v. <u>Beverly Enterprises</u>,

476 F. 2d 393 (9th Cir. 1973), the Court held that
entering into a contract of sale with a secret reservation not to perform is fraud cognizable under section
10(b) of the Securities Exchange Act of 1934. The

Walling case was an action brought on behalf of shareholders of a corporation, alleging that defendant
corporation had entered into a contract to acquire the
shareholders' stock in exchange for stock in defendant
corporation. The holding in <u>Walling</u> applies by analogy
to the present case, where defendants extended a tender
offer to acquire shares in exchange for <u>cash</u> with the
secret reservation of not intending to proceed to consummate the transaction.

In the instant case, had G & W disclosed that its true intention in extending the tender offer was to gain an advantage in attacking plaintiff's action, and not to eventually seek to consummate the tender offer, then the shareholders who continued to tender their shares in response to the extensions would have

known that it was fruitless to do so. This would have given the tendering shareholders the knowledgeable choice of withdrawing and selling their shares elsewhere in order to cut their losses. Therefore, the misleading of the tendering shareholders by G & W in connection with the extensions of the tender offer was a clear violation of the Williams Act.

## POINT III

THE DISTRICT COURT ERRED IN HOLDING THAT THE DEFENDANTS WERE EXCUSED FROM THEIR CONTRACTUAL OBLIGATIONS BY REASON OF THE PRELIMINARY INJUNCTION AGAINST CONSUMMATION OF THE TENDER OFFER.

A. G & W's Tender Offer Became a Binding Contract Upon the Tendering of the Shares.

Defendant G & W's tender offer made on February 1, 1973, and communicated to plaintiff and the general public on February 2, 1973, was an irrevocable, unilateral offer to purchase up to 3,750,000 shares of A & P's common stock tendered on or before February 13, 1973. It was not merely a solicitation of offers, or an "offer for an offer," as the lower Court incorrectly suggested in Footnote 4 of its Opinion (98a). Rather it was a firm and specific offer of a unilateral contract which was to be accepted by the tendering of the shares. That this was the intention of G & W in making the tender offer early appears from the terms of the offer. The tender offer stated:

". . . G & W hereby offers to purchase 3,750,000 shares of common stock . . .

"G & W will purchase all share of A & P common stock which have been duly

tendered by 5:00 P.M. E.S.T. on Tuesday, February 13, 1973, up to the maximum of 3,750,000 shares. If more than 3,750,000 shares are tendered by February 13, 1973, G & W will purchase 3,750,000 shares on a pro rata basis and it reserves the right but will not be obligated to purchase any number of additional tendered shares on a pro rata basis . . . . " (Emphasis added 17a).

The express terms of the tender offer clearly demonstrate that it is a "firm offer" which became a binding contract with each tendering shareholder as soon as the shareholder tendered the A & P shares in the prescribed manner. Moreover, the language of the tender offer and the accompanying Letter of Tender continually referred to "acceptance of this offer" by the <u>shareholders</u>, which acceptance was to be accomplished by tendering the shares in the manner prescribed in the tender offer. For example, §4 of the Tender Offer states:

"The delivery of the Letter of Tender and the acceptance of this offer will constitute an agreement between the tendering stockholder and G & W, in accordance with the terms of this offer . . . . (17a-1)."

Under the terms of the Tender Offer, G & W had no option to reject properly tendered shares other than the

condition that it was only obligated to purchase a maximum of 3,750,000 shares on a pro rata basis.

A tender offer in the form made by G & W is a classic example of an offer of a unilateral contract with acceptance being accomplished by the act of tendering the shares in accordance with the terms of the tender offer. Upon the proper tendering of the shares, G & W's promise to pay for them ripened into a legal duty. E.g. Grossman v. Schenker, 206 N.Y. 466, 100 N.E. 39 (1912); Scott v. Motor Lodge Properties Inc., 231 N.Y.S. 2d 780 (1962); Eraser Co. v. Kaufman, 138 N.Y.S. 2d 743 (1955); In re Lord's Will, 175 Misc. 921, 25 N.Y.S. 2d 747 (1941); City Stores Co. v. Ammerman, 266 F. Supp. 766 (D.C. 1967).

The tender offer also was a binding contract under the New York General Obligations Law, which provides at §5-1109:

"Written irrevocable offer. Except as otherwise provided in §2-205 of the Uniform Commercial Code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in writing, signed by the offeror, or by his agent, which states that the

offer is irrevocable during a period set forth or until a fixed time, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability."

It is conceded that New York law governs this action and, accordingly, under New York law the tender offer constituted an irrevocable offer which plaintiff and the tendering shareholders duly accepted when they tendered their shares.

In Bache & Co. v. International Controls Corp.,

324 F. Supp 998, 1005 (S.D.N.Y. 1971), aff'd per curiam,

469 F.2d 696 (2nd Cir.1972), this Court affirmed the

holding that a cash tender offer became a binding con
tract upon the tendering of the shares, making the offeror

company liable in damages when it wrongfully refused to

accept and pay for the tendered shares. In the present

case, plaintiff and the members of the plaintiff class

properly tendered their shares within the time and

manner specified by the tender offer, thereby creating

a binding contract. The defendants have never claimed

that the tendering shareholders in any way failed to

perform their part of the bargain.

In addition, the plaintiff, in reliance on the tender offer and the firm language used therein by G & W, changed position by purchasing 2,000 shares of A & P stock for the purpose of tendering them to G & W in accordance with the terms of the tender offer. Even apart from the purchase of shares for the specific purpose of tendering them, the tendering shareholders changed their position by the act of tendering their A & P shares and leaving them in the hands of G & W's depository in reliance on the tender offer, since by doing so the tendering shareholders sacrificed any opportunity they may have had to sell their shares on the open market as the market price of the A & P shares declined.

The contracts under the tender offer are binding upon G & W in spite of the fact that the tendering share-holders were given a right to withdraw the shares tendered prior to the close of business of February 9th or after April 3, 1973. This right of withdrawal merely complied with statutory requirements of the Securities Exchange Act, §14(d) (5). The statutory right of withdrawal of tender merely creates an option to withdraw on the part

of tendering shareholders, which they might choose to exercise or not.  $G \in W \lor A \in P$ , 476 F.2d 687, 698, note 19 (2d Cir. 1973). It did not excuse  $G \in W$  of its obligation once a binding contract was created.

B. Defendants Cannot Be Excused From Their Contractual Obligations Under the Doctrine of Illegality, As Their Own Conduct Was the Source of the Alleged Illegality.

In the instance case, there is no doubt that the G & W tender offer constituted an offer of unilateral contract which the tendering A & P shareholders accepted by the tendering of their shares. In fact, it appears that the defendants' motion for judgment did not deny there was a contract, but rather argued that G & W was excused from its contractual obligations under a hybrid theory of impossibility and illegality.

The hybrid, and inherently self-contradictory, nature of defendants' argument appears from the fact that, on the one hand, they argue that the plaintiff class cannot recover because the contract is illegal, while, on the other hand, they steadfastly maintain that the contract is not illegal, but merely impossible of performance

because of the preliminary injunction. The defendants switch back and forth between one theory and the other "without compunction", in an effort to obscure the fact that they are not entitled to be excused under either theory.

At the outset, we shall dispose of defendants' assertion that they are excused from their obligation to the tendering shareholders as a result of this Court's statement in <u>G & W</u> v. <u>A & P</u>, supra, 476 F.2d at page 698, that:

"A & P shareholders . . . have no inherent right to proceed with an unlawful tender; a requirement of lawfulness is included by implication in every tender offer."

The clear meaning of the above language is simply that the interests of the tendering shareholders would not justify specific performance of an illegal tender offer. However, this would in no way prevent G & W from litigating the legality of the tender offer on the merits or from taking steps to rectify antitrust problems in order to permit legal consummation of the tender offer.

Nor did it preclude tendering shareholders from holding

G & W responsible for monetary damages as result of the tender offer not being consummated. The latter issue simply was not before this Court in G & W v. A & P, and this Court never enjoined G & W from paying damages to the innocent parties whom it may have injured.

Because G & W chose not to litigate the preliminiary injunction on the merits, G & W itself foreclosed a final determination of whether its tender offer was legal.

Nevertheless, this in no way diminishes the underlying fact that the preliminary injunction was upheld by this Court based on the likelihood and probability that G & W and Bluhdorn had indeed violated the antitrust and securities laws in making the tender offer. The defendants cannot escape responsibility for these violations merely on the ground that they chose not to litigate them to a final result.

The circumstances under which the doctrine of "illegality" will excuse performance of a contract are extremely limited. The idea that a contracting party may escape the consequences of its own illegal acts has found little favor with the Courts. E.g., A.C. Frost &

Co. v. Couer D'Alene Mines Corporation, 312 U.S. 38, 44, (1941). Thus it is well established that "illegality" is not a defense where the circumstances are such that only one party to the contract was aware of the facts creating the alleged illegality or, as is clearly the case here, where only one party to the contract was a participant in the events leading to the alleged illegality. In such circumstances, the other party to the contract, i.e., the innocent party, is entitled to enforce the contract, at least to the extent of recovering damages. These principles are set forth in the Restatement of Contracts as follows:

"\$599. Ignorance of Facts Rendering Bargain Illegal.

Where the illegality of a bargain is due to

- (a) facts of which one party is justifiably ignorant and the other party is not, or
- (b) statutory or executive regulations of a minor character relating to a particular business which are unknown to one party, who is justified in assuming special knowledge by the other party of the requirements of the law

the illegality does not preclude recovery by the ignorant party of compensation for any performance rendered while he is still justifiably ignorant,

or for losses incurred or <u>qains prevented by</u> non-performance of the bargain." (Emphasis supplied).

"§458. Supervening Prohibition or Prevention by Law.

A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited

(a) . .

(b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States." (Emphasis supplied)

In applying §458 of the Restatement, the Courts have been careful to emphasize that illegality which is the fault of the party owing the performance does not excuse liability for damages. Thus, in <u>Seedman v. Friedman</u>, 132 F.2d 290, 296 (2d Cir. 1942), this Court stated:

"The court, however, stressed the injunction as a supervening act making impossible the performance of the contract. There has been much discussion in this case of the rule that performance of a contract is excused where it is forbidden by a judicial order. We shall not, however, go into that problem further

than to say that the rule is not applied where the fault of the party owing performance under the contract contributed to the order. A.L.I. Restatement, Contracts, §458. It would appear here that there was sufficient contributory fault on the part of the debtor, whose fraud was the basis of the order, to prevent application of the rule." (Emphasis supplied)

This same principle is applicable under New York law as well as federal law, as this Court recently recognized in <u>Fearlstein</u> v. <u>Scudder & German</u>, 429 F.2d 1136, 1140 f.n. 4 (2nd Cir. 1970):

"Under New York law, a party to a contract who renders its performance illegal by his own fault appears to be liable for breach. See Dolman v. United States Trust Cc., 206 Misc. 929, 134 N.Y. S.2d 508, 511, aff'd, 1 A.D. 2d 809, 148 N.Y.S. 2d 809, rev'd on other grounds, 2 N.Y. 2d 110, 157 N.Y.S. 2d 537, 138 N.E. 2d 784; Restatement of Contracts §§457, 458."

And in Peckham v. Industrial Securities Co.,

31 Del. 200, 113 Atl. 799 (1921), a case frequently cited
by the New York courts, see e.q., Berger-Tilies Leasing

Corp. v. York Associates, Inc., 53 Misc. 2d 490, 279

N.Y.S. 2d 62 (1967), Brown v. J.P. Morgan & Co.,

177 Misc. 626, 31 N.Y.S. 2d 323 (1941), the Court said:

"The cases on the subject are not numerous, neither are they uniform in holding that an injunction secured by a private party will not excuse performance of a contract. But they do seem to be uniform in holding that where the contract is lawful and possible of fulfillment, such an injunction will not excuse a breach. And there is also uniformity in this: that where the injunction or other judicial interference is caused by the fault of the defendant it will not excuse the performance of his contract." (Emphasis supplied.)

The same basic principle, i.e., that as to an innocent party illegality is not a defense, applies to conduct which is in violation of the securities laws. Thus, while Section 29 (b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78 cc (b), renders void contracts made in violation of the Act, this has been interpreted as meaning void only as to perpetrator of the violation, and not as to the innocent party injured thereby. This was spelled out by the Supreme Court in the leading case of Mills v. Electric Auto-Lite Company, 396 U.S. 375, 386-388, 90 S. Ct. 616, 622-623 (1970), as follows:

"We do not read §29 (b) of the Act, which declares contracts made in violation of the Act or a rule thereunder 'void \* \* \* as regards the rights of ' the violator and knowing successors in interest, as requiring that the merger be set aside simply because the merger agreement is a 'void' contract. This language establishes that the quilty party is precluded from enforcing the contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation. The lower federal courts have read §29 (b), which has counterparts in the Holding Company Act, the Investment Company Act, and the Investment Advisers Act, as rende ing the contract merely voidable at the option of the innocent party . . . This interpretation is eminently sensible. The interest of the victim are sufficiently protected by giving him the right to rescind; to regard the contract as void where he has not invoked that right would only create the possiblity of hardships to him or others without necessarily advancing the statutory policy of disclosure." (Emphasis supplied.)

To the same effect are A.C. Frost & Co. v. Coeur D'Alene Mines Corp., supra, Bankers Life & Casualty Company v. Bellanca Corp., 288 F.2d 784 (7th Cir. 1961), cert. denied, 368 U.S. 827, 82 S. Ct. 47 (1961); Wood v. Reznik, 248 F. 2d 549 (7th Cir. 1957); Fuller v. Dilbert, 244 F. Supp. 196 (S.D.N.Y. 1965).

Nor does the fact that the alleged illegality stems from an antitrus: violation excuse a breach of contract in a suit by an innocent party, see Kelly v. Kosuqa, 358 U.S. 516 (1959); General Aniline and Film Corp. v. Bayer Company, 281 App. Div. 668, 117 N.Y.S. 2d 497 (1st Dept. 1962, affirmed, 305 N.Y. 479 (1953).

Application of the foregoing principles to the instant case requires that the defendants' motion for summary judgment be denied. It is clear from the prior decision of this Court in the <u>G & W v. A & P litigation</u> that the illegality which G & W is asserting here is, in reality, its own illegal acts and conduct in connection with the making of the tender offer.

At the very least, the defendants' responsibility for these alleged violations presented a disputed issue of material fact which clearly precluded summary judgment in favor of defendants in the present case. Instead, the District Court improperly took it upon itself to resolve this issue against the plaintiffs, as follows:

The impossibility here, at least to the extent that it is based on the anti-trust violations, cannot be said to be caused by any particular party. If there

be an antitrust violation here, it is the result of the juxtaposition of facts which were not intentionally incurred by defendants.

The defendants have from the beginning denied that in fact the acquisition of the tendered shares would create potential market conditions violative of the antitrust laws. Nor have defendants acknowledged that they have violated the Williams Act" (93a-94a).

The question of whether the defendants caused or "intentionally incurred" the antitrust violations, upon which the preliminary injunction was partly based, is a disputed factual issue which the Court could not properly determine upon a motion for summary judgment. Furthermore, the Court said nothing about the defendants' responsibility for the probable violations of the Securities Exhange Act of 1934. Rather than permitting an evidentiary hearing on these issues, the District Court merely relied on the defendants' own self-serving denials of such violations.

The lower Court incorrectly assumed that defendants did not cause the illegality that resulted in the pre-liminary injunction, but that it was caused merely by

a "juxtaposition of facts" for which defendants could not be held responsible. Not only is this assumption not supported by the record, but the record supports a contrary finding. In any event, such inferences could not properly be construed against the plaintiff class in dismissing the complaint.

The record in the G&W v. A&P litigation contained substantial evidence of G&W's and Bluhdorn's conscious attempt to acquire control of A&P. Furthermore, these defendants must be presumed to have had prior knowledge of their various holdings and the other facts that provided the basis of the preliminary injunction. To excuse them on the ground that the illegality resulted merely from a "juxtaposition of facts" would create a dangerous precedent, since most, if not all, antitrust and securities law violations may be argued as being the result of an unintentional "juxtapositions of facts." Such a legal precedent would inevitably come back to haunt the Courts in their enforcement of antitrust and securities laws.

The District Court brushed aside G & W's clear responsibility for having brought the preliminary injunction upon itself by its own wrongful conduct by stating:

"The impossibility in this case rests on the finding of this Court, affirmed by the Court of Appeals, that issues raised by A & P, not G & W, are such that preliminarily this tender offer should not go through. If any party is going to be characterized as an efficient cause of the impossibility here, then A & P must bear that stamp, not G & W." (94a)

This suggestion that A & P's suit was the efficient cause of the injunction rather than G & W's wrongful conduct is like saying that the problems of an anti-trust violator were caused by the Justice Department or Attorney General in prosecuting and not by the violator of the antitrust laws.

C. Defendants May Not Be Excused From Their Breach of Contract Under the Theory of Impossibility of Performance, Since They Failed to Do All That Was Within Their Power to Consummate The Tender Offer.

As has been previously pointed out, the defense being asserted by the defendants boils down to one of "illegality," because the preliminary injunction was based on the likelihood and probability that the tender offer was illegal under the antitrust and securities laws. However, even if the case were to be approached from the standpoint of "impossibility of performance", it was still error for the District Court to grant summary judgment in favor of the defendants, as there were disputed issues of fact with respect to that theory of defense.

It is well settled that before the defense of impossibility can be applied, a party must do all within its power to perform the contract regardless of the hardship involved. See Brown v. J.P. Morgan & Co., 177 Misc. 626, 635, 31 N.Y.S., 2d 323, 333 (1941), Dezsofi v. Jacoby, 178 Misc. 851, 36 N.Y.S. 2d 672 (1942). This principle, as applicable under New York law, is set forth in Kiyoichi

Fujikawa v. Sunrise Soda Water Works Co., 158 F.2d 490, 492-493 (9th Cir. 1946), as follows:

"The rule regarding impossibility of performance as an excuse for not discharging such an obligation is well stated in the case of Richards & Co. v. Wreschner, 174 App. Div. 484, 156 N.Y.S. 1054. The court in that case involving a defendant's failure to provide antimony because of adverse war conditions held, quoting from Cameron Realty Co. v. Albany, 207 N.Y. 377, 101 N.E. 162, 49 L.R.A., N.S., 922,

'It is a well-settled rule of law that a party must fulfill his contractual obligations. Fraud or mutual mistake, or the fraud of one party and the mistake of the other, or an inadvertence induced by the one party and not negligence on the part of the other, may relieve [one] from an expressed agreement, and an act of God or the law or the interfering or preventive act of the other party may free one from the performance of it; but if what is agreed to be done is possible and lawful the obligation or performance must be met. Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the

expense or the loss to the one party or the meagerness or the uselessness of the result to the other. will neither make nor modify contracts nor dispense with their performance. When a party by his own contract creates a duty or charge upon himself, he is bound to a possible performance of it, because he promised it, and did not shield himself by proper conditions or qualifications.' (174 App. Div. 484, 156 N.Y.S. 1056) (Emphasis supplied.)

The rule applies as well to any obligation, the performance of which is sought to be excused. Dezsofi v. Jacoby, 178 Misc. 851, 36 N.Y.S. 2d 672; Brown v. J.P. Morgan & Co., Inc., 177 Misc. 626, 31 N.Y.S. 2d 323."

The instant case, at the very least, presents a factual issue as to whether G & W did all within its power to fulfill its contractual obligations to the tendering shareholders. The Court below failed to properly recognize the existence of this issue of fact, and instead resolved the factual question against the plaintiff as follows:

"It cannot be suggested that the defendants sought to extract themselves from this contract by their own purposeful acts. On the contrary, they have vigorously sought to defend against such alleged violations" (94a).

Actually, the established facts show that far from doing all within its power to comply with the contractual obligations, G & W did virtually nothing. It is clear that G & W made no effort to cure the defects in the tender offer that led to the preliminary injunction against its consummation. It made no attempt to correct the alleged antitrust violations. It made no attempt to make further disclosures and thereby cure the alleged securities law violations. Finally, and most important, it made no attempt to pursue the G & W v. A & P litigation to vindicate its claim that the tender offer was legal. On the contrary, it settled that litigation to the prejudice of the tendering shareholders shortly after the District Court filed its opinion in the instant case.

That any of the foregoing courses of action to cure the defects in the tender offer might have been expensive or burdensome to G & W does not in any way excuse its failure to make such efforts. The Courts in New York, as well as other jurisdictions, have repeatedly held that financial hardship or increased expense do not give rise to the defense of "impossibility of performance."

See, e.g., 407 E. 61st Garage, inc. v. Savoy Corp., 23
N.Y. 2d 275, 296 N.Y.S. 2d 338, 244 N.E. 2d 37 (1968);

American Store Equipment and Construction Corp. v. Buffalo

Municipal Housing Authority, 202 Misc. 222, 111 N.Y.S. 2d

688, aff'd., 282 App. Div. 824, 122 N.Y.S. 2d 533, aff'd.,

306 N.Y. 773, 118 N.E. 2d 478 (1953).

This rule applies even when the additional expense is the result of an injunction brought by a third party.

Savage v. Peter Kiewit Sons' Co., 432 P.2d 519 (Ore. 1967), opinion modified on other grounds, 437 P.2d 487 (Ore. 1968).

Directly on point is the leading case of <u>Peckham</u> v.

industrial Securities Co., 31 Del. 200, 113 A.799 (1921),
in which the defendant sought to be excused from his contract on the theory of "impossibility of performance,"
because of a preliminary injunction secured by a third party against the consummation of the contract. The
Court held that there was no showing of impossibility because the defendant had not made a <u>bona fide</u> effort to dissolve the injunction or to remedy the underlying causes.
This holding has been cited with approval and followed by New York courts. <u>Brown v. J.P. Morgan & Co., supra, 31</u>

N.Y. S.2d at 334; see also, <u>Dezsofi</u> v. <u>Jacoby</u>, 36 N.Y.S. 2d 672, 178 Misc. 851 (S.Ct. 1942). In <u>Peckham</u>, the Court stated:

"... But in the honest effort to carry out his agreement he must, if possible, procure the dissolution of the injunction, or secure the dismissal of the interfering proceeding by removing the cause therefor.

\* \* \*

". . . [Wie are also of the opinion that the plea setting up such excuse must show the injunction relied upon as a defense made performance impossible, and also that it was not secured by the act or fault of the defendant. A party will not be permitted to escape liability under his contract by securing or consenting to an injunction. And, if the defendant could have secured a dissolution of the injunction, it did not make performance of his contract impossible within the meaning of the law. It must appear that the injunction was not secured by the act or fault of the defendant, and also that an effort has been made by the defendant to dissolve the injunction or that such an effort would have been futile, if made." Id., 113 A. at 802. (Emphasis added.)

It is apparent that, for purposes of defendants' motion for summary judgment, there were factual issues as to whether G & W did all within its power to perform

its contract and, therefore, it was error for the District Court to grant summary judgment to the defendants on the theory of impossibility of performance.

D. The District Court Erred in Finding That The Plaintiff Class Had Such Knowledge of The Alleged Illegality Or Impossibility As to Bar Their Recovery of Damages Under The Contract.

Another disputed issue of fact which the District

Court improperly resolved against the plaintiff class-and contrary to the facts of record-- was the question
of whether the tendering shareholders had such prior
knowledge of the alleged impossibility or illegality as
to bar their recovery under the contract. The lower court
stated:

ignorant of the facts constituting the illegality at the time the contract becomes irrevocable for him. As plaintiff stated in his papers, he tendered the shares sometime after the 2nd of February and before the 13th of the month. As of the 5th of February, all shareholders of A & P can be held to be on notice of the pendency of the litigation regarding the propriety of the tender offer, and clearly the result of the litigation is the basis of the impossibility of performance here.

. . Thus, even if this court were

of the persuasion that there were illegality here, it must be assumed that plaintiff was on notice of the facts comprising the impossibility, namely, allegations of Antitrust and Securities Acts violations to an extent which would preclude his recovery." (Emphasis added.) (95a)

Here the lower court has not only ignored the existence of a disputed issue of fact, but has "assumed" facts that are not of record. Actually, the only "notice" plaintiff received was news reports about the intercorporate litigation. These published reports merely revealed that defendant G & W had instituted suit against A & P management for opposing the tender offer, and that A & P had filed a countersuit alleging antitrust and securities law violations. Defendant G & W not only denied these allegations in the press, but continually maintained that the tender offer was legal and would be upheld in the courts.

It cannot be assumed that plaintiff knew of any inherent illegality in the tender offer and the "juxta-position of facts" surrounding it. The District Court itself has pointed out that it made no determination of "the merits of the alleged violations of the Securities

and Antitrust Laws" in its opinion of February 13, 1973 (94a). It merely held that "these questions are substantial, difficult and doubtful" (94a). Yet, ironically, the lower court has attempted to excuse G & W and Bluhdorn -- who had full knowledge of the facts concerning the tender offer and the alleged violations -- of any responsibility for incurring the preliminary injunction, while holding that the tendering shareholders had notice of facts that should have led them to conclude that the offer was illegal or impossible of performance.

The record contains no facts that would in any way support the lower court's assumption that, at the time of tender, "plaintiff was on notice of the facts comprising the impossibility." At the time of tender there was no injunction -- merely litigation. Plaintiff had no way of knowing that the District Court would issue a preliminary injunction late in the day on February 13th, or that it would be affirmed by this Court, or that G & W would subsequently choose not to litigate the injunction on the merits or to take other steps to legalize the consummation of the tender offer. Yet knowledge of all these future events would have been neces-

sary in order to put plaintiff on notice of the alleged "impossibility." Thus, in holding that plaintiff was on notice of illegality or impossibility, the lower court held plaintiff responsible for having a knowledge and understanding of the facts surpassing that of defendants and the Court itself.

As will be more fully discussed in Point VI., the omission of a "litigation out" provision from the tender offer entitled the tendering shareholders to assume that G & W would bear the risk of adverse consequences arising from litigation over the tender offer. However, even without this assumption, the extent of any knowledge by the tendering shareholders as to the illegality of the tender offer clearly presented a question of fact which could not be determined on motion for summary judgment.

## POINT IV

THE COURT BELOW ERRED IN HOLDING THAT G & W HAD DEALT FAIRLY WITH THE TENDERING SHAREHOLDERS.

In granting summary judgment in favor of defendants, the Court below held that the maker of a tender offer had "...a duty of dealing fairly with the persons making the tender" but that "There is no evidence that defendants have done anything other than deal fairly with plaintiff and the class he represents" (97a). We agree that fair dealing certainly is one of the duties which the law imposes on the maker of a tender offer; however, it is not the only duty. The maker of a tender offer also is under a duty to comply with its contractual obligation and to make all the disclosures of material facts required under the securities laws. Therefore. even if there were a basis for concluding that G & W had dealt fairly with the tendering shareholders which there was not - this, by itself, would not be sufficient to authorize the granting of summary judgment in its favor.

The Court below based its conclusion that G & W had dealt fairly with the tendering shareholders on the erroneous premise that although it had extended the tender offer three times, during each extension of the offer the tendering shareholders were permitted to withdraw their shares at any time (96a). In reality, G & W did not give tendering sharesholders the option of withdrawing their shares until March 14, 1973, Furthermore, the record shows that G & W's extensions of the tender offer were made in bad faith and solely for the purpose of escaping liability to the tendering shareholders. As pointed out in Point II F. supra, G & W extended the tender offer not for the purpose of curing the defects which led to its being enjoined, and not for the purpose of proceeding to the speedy trial on the merits of the G & W v. A & P action as this Court had suggested, but rather solely to gain time to attack the instant law suit. G & W did not disclose to the tendering shareholders that this was its purpose in extending the tender offer. Its failure to disclose this true intention was, itself, a violation of the Williams Act, and certainly rebuts any suggestion

that G & W acted fairly with the tendering shareholders.

Moreover, this Court found in the G & W v. A & P litigation that there was a reasonable probability that G & W had violated the Williams Act in failing to make required disclosures in the tender offer. If G & W had in fact failed to make required disclosures, then, by definition, it did not act "fairly" with the tendering shareholders. Given the fact that this Court had held that there was a reasonable probability that A & P would succeed in its contention that G & W had violated the Williams Act in the making of the tender offer, the evidence in the record at least raised a genuine issue of fact as to whether G & W had acted fairly with the tendering shareholders in the making of the tender offer. Thus, to the extent that the decision below is predicated upon the finding that G & W acted fairly to the tendering shareholders, it is clearly in error, as there was a genuine issue of fact present as to whether G & W had acted "fairly" which could not be resolved against the plaintiff class on motion for summary judgment.

## POINT V

## THE PLAINTIFF CLASS SUFFERED LEGALLY COGNIZABLE DAMAGES.

The court below, acting <u>sua sponte</u>, also held that the complaint should be dismissed because the tendering shareholders had suffered no damages "cognizable at law" (97a). Although admitting that this point had been neither briefed nor argued by either side, the court below actually made this the sole grounds for dismissing the complaint. Thus, the court below stated (96a-97A):

". . .There is moreover, serious question as to the issue of what, if any, damages the plaintiff and the class he represents have sustained. This point has not been briefed by either side. But I seriously question what, if anything, could be assessed as damages. The defendants have extended the tender offer three times but each extension of the offer has permitted plaintiff and the class which he represents to withdraw any shares which may have been tendered. Plaintiff and the class, thus, have not been deprived of the use of their shares.

". . . However, since plaintiff and the class he represents have suffered no damage cognizable at law, the complaint must be dismissed." (Emphasis supplied.)

In stating that the tendering shareholders had not been deprived of the use of their shares, the court below clearly misread the terms of the tender offer. In point of fact, the tendering shareholders were deprived of the use of their shares for a substantial period of time, and they suffered a sizable monetary loss as a direct result thereof.

The court below incorrectly stated that, under the terms of the tender offer, there was no final contract until the end of the day on February 13, 1973 (95a), and that a tendering shareholder could withdraw his shares at any time until that day. Both the express terms of the offer and the facts of record clearly demonstrate that this was not the case. Under the express terms of the tender offer, a binding contract was created whenever an A & P shareholder accepted the offer by tendering his shares in the manner prescribed in the toder offer. G & W had no option to reject

the shares if they were properly tendered. Therefore, it is clear that the creation of a binding contract was not deferred until the end of the day on February 13, 1973, as the lower court stated. Furthermore, the lower court utterly ignored the fact that under the express terms of the tender offer, the tendering shareholders could not withdraw their shares between February 9 and April 3, 1973. During that period of time, the tenders were to be irrevocable (Tender offer, § 3 (17a-1)).

The record clearly shows that after February 9th, the earliest time that tendering shareholders had the option to revoke their tender was March 14, 1973, when G & W first announced that tendered shares could be withdrawn. Therefore, even under the lower court's own test of damages, there was a period of at least 29 days during which appellant and the plaintiff class were "deprived of the use of their shares." For those shares tendered prior to February 9, 1973, the period of irrevocability was 33 days. During those 29 to 33 days, the market price of A & P stock dropped from a

high of 18-5/8 on February 9th and a high of 18-1/2 on February 13th to a low of 14-5/8 on March 14, 1973, the day that G & W announced the tendered shares could be withdrawn. As the price of A & P stock plummeted, the tendering shareholders had no opportunity to sell their shares to avoid further losses, even if they had wanted to do so, because during that time the tenders were irrevocable.

This Court has recognized that the decline in market value of securities is a proper element of damages under similar circumstances. See <a href="Pearlstein">Pearlstein</a> v. <a href="Scudder and German">Scudder and German</a>, 429 F.2d 1136 (2d Cir. 1970), on remand, 346 F. Supp. 443 (S.D.N.Y. 1972). See also <a href="Landry">Landry</a> v. <a href="Hemphill">Hemphill</a>, Noyes & Co., 473 F.2d 365 (1st Cir. 1973). However, the damages actually suffered by plaintiff and the members of the class were much greater than just the decline in the market value of their stock, for they also lost the benefit of their bargain for the sale of their stock.

That loss of bargain damages are recoverable for breach of a tender offer was recently recognized in

Bache & Co. v. International Control Corp., 339 F. Supp. 341 (S.D.N.Y.), affirmed, 469 F. 2d 696 (2d Cir. 1972). There the court held that all the remedies available to a seller for breach of contract under the New York Uniform Commercial Code were available to a tendering shareholder where the maker of the tender offer has breached the contract. The court stated, (399 F. Supp. 348-349;)

"Since New York law applies, damages must be assessed under the New York Uniform Commercial Code. At the outset it is important to note that the general policy of the New York Uniform Commercial Code ("UCC") is as follows:

- § 1-106 Remedies To Be Liberally Administered
- (1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . (New York UCC.)
  - (A) Unsold Securities
  - (1) Section 8-107

The New York UCC gives a seller of securities the right to recover the agreed price of the securities as an 'alternative' to any other remedy. The controlling section is § 8-107(2) which reads in pertinent part:

'Where, pursuant to a contract to sell or a sale, a security has been delivered or tendered to the purchaser, and the purchaser wrongfully fails to pay for

the security according to the terms of the contract or the sale, the seller may as an alternative to any other remedy recover the agreed price of the security . . . .

The commentary on this section acknowledges that this is a rule peculiar to New York, a rule relieving the seller of securities tendered or delivered of any duty to mitigate damages by resale in the market prior to suing for the purchase price. There is not even the need for evidence that there is no available market, or that efforts at resale would be unduly burdensome. Practice Commentary, New York Uniform Commercial Code, § -107, at 177 (McKinney 1964). Thus, a seller of securities is given the alternative of holding the rejected securities and recovering the tender price." (Emphasis supplied.)

The court further stated that under Section 2-703 of the New York Uniform Commercial Code, a seller may resell the securities and recover damages for non-acceptance under Section 2-708 of the Code, which provides that the measure of damages for non-acceptance is the difference between the market price at the time and place of tender and the unpaid contract price together with any incidental damages, see 339 F. Supp at 352-353.

In the instant case the offered price was \$20 per share. The value of A & P stock at the time that G & W

finally withdrew its tender offer was \$12.50 per share. Thus, under the measure of damages recognized in Bache & Co. Inc. v. International Controls Corp., supra, each tendering shareholder had suffered damages at the rate of \$7.50 per share, plus incidental damages for interest and commissions. To hold, as the court below did here, that the tendering shareholders had suffered no damages cognizable at law is obvious error. The fact is that the amount of their damages is clear and can be easily established from the records of the selling prices of A & P stock. Moreover, if it were to be contended that some other measure of damages might be more appropriate, the question of damages clearly presented a factual question, which for purposes of G & W's motion for summary judgment must be construed in the light most favorable to plaintiff. So viewed, there clearly was a triable issue of fact with respect to the damages suffered by the class of tendering shareholders, and therefore it was error to grant summary judgment to defendants on this basis.

## POINT VI

THE ENJOINING OF CONSUMMATION OF THE TENDER OFFER DID NOT EXCUSE G & W FROM LIABILITY FOR DAMAGES FOR BREACH OF CONTRACT. ACCORDINGLY, SUMMARY JUDGMENT SHOULD BE ENTERED IN FAVOR OF PLAINTIFFS

The possibility that legal action may be instituted against a tender offer is a known risk to the makers of tender offers. See Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 209, 209-210. (2d Cir. 1973). For this reason, most tender offers contain provisions relieving the maker of the offer from liability arising out of the offer should litigation be instituted against the offer in any court. This type of "litigation out" provision is "boiler plate" in most tender offers, and is designed to cover precisely the type of situation which arose here. A typical "litigation out" provision is as follows:

"Certain Conditions of the Offer. The Offeror shall not be required to purchase or pay for any shares tendered, if before the time of payment therefore:

<sup>(</sup>b) there shall have been instituted or

threatened any action or proceeding before any court or governmental agency, by any governmental agency or any other person, challenging the acquisition by the Offeror of shares of the common stock or otherwise relating to this Offer, or otherwise affecting the Offeror or the Company which is, in the judgment of the Offeror's management, materially adverse;"\*

In the instant case, however, this type of "litigation out" provision was omitted from the G & W tender offer. There is considerable history in the background leading to the making of the tender offer which indicates that G & W omitted this provision from the tender offer in order to encourage the tendering of shares and, specifically, to encourage private investors, such as plaintiff, to b A & P shares on the open market in order to tender them, something that they would not be willing to do if they thought that litigation against the tender offer might excuse G & W from purchasing the shares and leave them holding shares which had a declining value.

Specifically, the evidence in the prior litigation in the  $\underline{G \& W} \lor \underline{A \& P}$  action disclosed that, prior to the making of the tender offer, defendant Bluhdorn

<sup>\*</sup> Quoted from paragraph 7 of tender offer for purchase of shares of Texasgulf, Inc. reproduced at page 226a of the Joint Appendix.

approached holders of large blocks of A & P stock in an effort to purchase their stock privately. He was unsuccessful in these efforts, see 356 F. Supp. at 1069. In addition, during the two-year period preceding the tender offer the A & P management had introduced the WEO discounting policy, which caused the management of Bohack, of which Bluhdorn was the largest individual shareholder, to actively campaign against A & P, see 356 F. Supp. at 1068-1069. Thus defendants Bluhdorn and G & W had every reason to expect that the A & P management would fight any tender offer that was made. Because of their inability to purchase large blocks of A & P stock privately, G & W and Bluhdorn also knew that they would have to look to members of the general investing public, rather than holders of large blocks of A & P stock, as the source of much of the stock that they wished to obtain. They therefore pegged the price of the tender offer at \$20 a share, substantially above the then market price for the stock, not only to encourage holders of A & P shares to tender their stock, but also to encourage members of the general public to

purchase A & P stock on the open market in order to tender this stock in response to the tender offer. In these circumstances, a "litigation out" provision relieving G & W from liability to purchase the stock should litigation be instituted against the tender offer had to be omitted, as otherwise individual investors would hesitate to purchase A & P shares in order to tender them if, by doing so, they would face substantial danger of subsequently being left with the A & P stock should G & W choose to rely on the "litigation out" provision. This undoubtedly was the reason why the "litigation out" provision was omitted from the tender offer. However, whatever the reason may have been, it is clear that it was omitted. Under these circumstances, G & W cannot be excused from liability for breach of contract when it could have, and should have provided for such eventuality in the tender offer itself.

A similar situation was considered by this Court in Glidden Co. v. Hellenic Lines, Limited., 275 F. 2d 253 (2d Cir. 1960), where a shipping company entered into a contract at a time when it knew of the possibility

that the Suez Canal subsequently might be closed, thereby shutting off the most economical route for its vessel.

During their negotiation of the contract, the parties agreed to omit a clause that would have protected the shipping company against this eventuality. When events in the Middle East caused a closing of the Suez Canal, the shipping company refused to perform, asserting "frustration of contract". This Court held that the shipping company was not excused from its performance, stating (275 F. 2d at 257):

"We would not be justified in interpreting the agreements as accomplishing by implication the very thing to which the parties declined to agree in express language. . . . We conclude that the closing of the Suez Canal did not excuse performance by Hellenic, but that it remained under an obligation to perform by an alternative route. . . " (Emphasis supplied.)

See also <u>Peckham</u> v. <u>Industrial Securities Company</u>, supra.

Realistically considered, the facts of the instant case do not permit the application of the defenses of either "illegality" or "impossibility".

Rather, the possibility that the tender offer might be

enjoined was a known risk in the making of the tender offer and was properly to be anticipated by G & W in making the tender offer. If G & W wished to be excused from performance of the tender offer on the basis of litigation being instituted against the offer, it could have so provided in the offer itself. Since it did not do so, plaintiff and the tendering shareholders had every right to interpret the tender offer as a commitment to either consummate the tender offer or to pay damages for breach thereof, whether or not litigation was instituted against the tender offer.

What defendant G & W is trying to do in the instant case is to gain the benefit of a "litigation out" provision in the tender offer even though it specifically omitted to include such a provision when it made the tender offer, precisely what this Court said could not be done in Glidden Co. v. Hellenic Lines, Limited, supra.

The court below, in sustaining the defenses of illegality and impossibility, completely ignored the fact that the tender offer did not contain a "litigation out" clause. Defendants argue that the statement in

this Court's decision in the prior appeal in the  $\underline{G \ \& \ W}$ v. A & P litigation that "a requirement of lawfulness is included by implication in every tender offer," see 476 F. 2d at 698, in effect reads into every tender offer a "litigation out" provision. This is a faulty reading of this Court's prior decision. This statement was made by this Court in the context of the right of the tendering shareholders to proceed with the consummation of the tender offer, a remedy analogous to specific performance of the contract. This Court held only that the remedy of specific performance was not available where the result might be a lessening of competition in violation of the antitrust laws. This Court did not hold, and indeed did not even have occasion to consider, the other remedies such as damages which might be available to the tendering shareholders for breach of contract.

In addition, considering the duty of corporations under Sections 14(d) and (e) of the Securities Exchange Act to make full disclosure of material facts, it is unrealistic to assume that this Court, by the language

quoted, intended to relieve corporations making tender offers from the duty to disclose that they were reserving the right to rescind a tender offer should litigation be instituted against it. That the maker of a tender offer will attempt to avoid its contractual liability if the tender offer is enjoined certainly is a material matter to all tendering shareholders.\* It follows that the failure to disclose this in the tender offer made the tender offer "clearly misleading" and in violation of Section 14(e). This Court's holding that it would not enforce consummation of an illegal tender offer did not mean that it was relieving the maker of the tender offer of its Section 14(e) duty to fully disclose what action it would take if litigation was instituted against the tender offer, nor was this Court relieving the makers of tender offers from liability for damages for breach of contract under circumstances which they could foresee and normally would cover under the terms of their tender offers.

Since it is undisputed that the G & W tender offer did not contain any "ligitation out" clause, and since

<sup>\*</sup>Intention as to a future course of action should a prospective event occur may be a "material matter," even though the event does not occur. If knowledge of such intention would affect a reasonable investor's decision, then it is material even though it relates to future conduct. See Sonesta International Hotel Corp. v. Wellington Associates, 483 F. 2d 247, 251 (2d Cir. 1973).

the basis on which defendants are claiming to be relieved from their contractual liability to the tendering share-holders arises from the litigation with A & P, which, by reason of the absence of a "litigation out" provision, does not constitute a defense to the tendering share-holders' claim for damages for breach of contract, the decision below denying plaintiff's motion for summary judgment is in error and should be reversed.

## POINT VII

THE COURT BELOW'S CRITICISM OF MR. LOWENSCHUSS WAS IMPROPER AND WARRANTS REMEDIAL ACTION BY THIS COURT.

It is with regret that counsel find it necessary to raise on this appeal the issue that Judge Duffy acted with manifest bias towards Mr. Lowenschuss individually, a bias which undoubtedly influenced his disposition of the litigation. While we recognize that this Court normally would not become involved in a personal dispute between a District Judge and counsel, and in the normal course of events such a dispute would not become the subject of an appeal, the professional harm done to Mr. Lowenschuss by several of the statements in the opinions of the court below is of such a serious nature as to warrant the extreme step of seeking relief in this Court.

As this Court has had occasion to state on previous occasions, a District Judge should and does have complete independence in making any statement that he deems appropriate in his judicial opinions, see <u>Garfield</u> v.

Palmieri, 193 F. Supp. 582 (E.D.N.Y. 1960), aff'd, 290 F. 2d 821 (2d Cir.), cert. denied, 368 U.S. 827 (1961); 193 F. Supp. 1377 (S.D.N.Y. 1961), aff'd, 297 F. 2d 526 (2d Cir.), cert. denied, 369 U.S. 871 (1962). An injured party has no remedy against the Judge directly; his only avenue of relief is through appeal, and it is for this reason that Mr. Lowenschuss finds it necessary to seek relief in this Court from the unwarranted statements criticizing him that were made by Judge Duffy in the opinions below.

While, as will be related below, there were several statements made both in Judge Duffy's original decision, and in his subsequent memorandum denying the motion for reargument, which manifested a bias against Mr. Lowenschuss individually, the one that was most damaging and, we submit, most improper, is footnote 1 to the original opinion (98a). In footnote 1, Judge Duffy suggested that the Pennsylvania Bar should investigate whether Mr. Lowenschuss had purchased the A & P stock for purposes of investment or as a vehicle for bringing the instant law suit in which counsel fees were being sought. The

suggestion that Mr. Lowenschuss may have engaged in unprofess onal, if not illegal conduct, was clear. This footnote was published with the original decision in the Federal Supplement and also in various other reporting systems that reported the decision. The immediate damage to Mr. Lowenschuss's professional reputation by the appearance of this footnote is apparent to the most casual observer.

The suggestion that Mr. Lowenschuss had engaged in unprofessional conduct was totally unwarranted. Mr. Lowenschuss purchased the A & P stock before, not after, A & P announced its opposition to the tender offer. (106a-107a, 114a-115a). This point easily could have been ascertained by Judge Duffy if he were truly interested in what the facts actually were, by a direct question on oral argument if oral argument had been granted. However, Judge Duffy denied plaintiff's request for oral argument, and his subsequent concern over when and why Mr. Lowenschuss acquired the A & P stock did not become known to Mr. Lowenschuss until after the bombshell of footnote 1 was dropped on him with the

filing of the opinion.

In point of fact, Mr. Lowenschuss acquired the A ? P stock neither as an investment nor as a vehicle for bringing a lawsuit, but for the express purpose of tendering the shares in response to the G & W tender offer (101a). This fact was made known to Judge Duffy immediately following the filing of his opinion (100a -101a). It was subsequently substantiated by affidavits which included the time slips of Mr. Lowenschuss's broker showing when the orders were placed (108a). However, Judge Duffy refused to take any steps to correct the suggestion of improper conduct which he had set before the legal world in footnote I to his opinion. Not only did Judge Duffy refuse to correct the charge, but, on the motion for reargument, he went further and criticized the plaintiff for seeking to have footnote 1 deleted from the opinion (133a). We submit that no attorney worth his salt who is mindful of his professional reputation would not have become immediately disturbed by the appearance in a judicial opinion of a statement such as appeared in footnote 1 of Judge

Duffy's opinion, and would not have gone back to the Judge who made the statement in an effort to have him correct the impression of improper conduct that the statement created.

In this context, Judge Duffy's statement on the motion for reargument that he was not "condemming the plaintiff here" but merely seeking to "awaken the Bar" is not an adequate answer to the impression of improper conduct on the part of Mr. Lowenschuss created by footnote 1, particularly when that comment was made in connection with a statement criticizing Mr. Lowenschuss for taking up the Court's time in seeking the removal of footnote 1 (133a). There are many ways for a judge to "awaken the Bar" to the need to investigate an attorney's conduct short of publishing a charge in a widely disseminated judicial opinion. The statements in the decision on the motion for reargument only added insult to injury.

We respectfully submit that if a District Judge intends to make a suggestion that an attorney's conduct should be investigated by the Bar, he at least owes to

that attorney an opportunity to be heard and has the responsibility to state the facts on which he concludes that investigation is necessary. Only in this manner can members of the Bar be protected from unwarranted and unjustifiable charges.

The fact of the matter is that Judge Duffy's footnote I did precipitate an investigation of Mr.

Lowenschuss by the Pennsylvania Bar, and on November 20, 1973, the Disciplinary Board of the Supreme Court of Pennsylvania issued a letter stating that the charges had been fully investigated and "the final determination is that you have not been guilty of unprofessional conduct in violation of the Code of Professional Responsibility" (135a). The Disciplinary Board made this determination known to Judge Duffy (135a). However, despite this notification and numerous requests by Mr.

Lowenschuss, Judge Duffy has consistently refused to take any action to correct the impression of improper professional conduct by Mr. Lowenschuss which footnote I created.\*

Under the circumstances, Mr. Lowenschuss has no

<sup>\*</sup> In addition, Judge Duffy has refused to allow the West Publishing Company to print the Disciplinary Board's findings in the Federal Supplement in connection with the opinion.

other avenue of relief but to seek to have this Court make known in its opinion on this appeal that Mr. Lowenschuss acquired the A & P stock prior to the announcement of the opposition to the tender offer and that there was a finding by the Disciplinary Board of the Supreme Court of Pennsylvania that he had not engaged in any unprofessional conduct.

Mr. Lowenschuss knows of no reason why Judge Duffy should be biased against him. He has never spoken to him, never personally appeared before Judge Duffy and never had any prior litigation before him. While Mr. Lowenschuss can offer no explanation as to why Judge Duffy should be biased against him, the fact remains that the opinions in this case in their tone and their repeated criticism of the plaintiff, do manifest the existence of such a bias. Footnote 1 to the original opinion is the most obvious indication of this bias. However, there are other illustrations as well. Thus, in the original opinion, Judge Duffy talks about plaintiff switching from contract claims to securities law claims "without compunction;" (89a).

Judge Duffy then referred to the "unsettling irony" in plaintiff seeking damages for breach of contract while continuing to tender his shares (96a). Granted that the latter points may be relatively minor matters, they were but further manifestations of Judge Duffy's critical attitude towards Mr. Lowenschuss. This critical attitude was compounded in the opinion on a motion for reargument. In the decision on the motion for reargument, Judge Duffy criticized the plaintiff for not bringing to his attention on the original motion that it would be a denial of due process to grant judgment against the members of the class prior to giving notice to the members of the class. Judge Duffy stated that:

"It would seem that the plaintiff withheld this point to see whether he won or lost. I am morally certain that if plaintiff had won, the point would never have seen the light of day. But plaintiff lost, so it is trotted out at the last minute" (133a).

This criticism, like the comments in footnote 1, was totally unwarranted by the facts of the case. The facts were that Mr. Lowenschuss had moved for class determination on March 16, 1973, long prior to the filling of the defendants' motion for judgment and

plaintiff's cross-motion for summary judgment. However, the court did not act on this motion at the time it was filed and before any motions on the merits were considered. Then, it was the defendants, not Mr. Lowenschuss, who filed the original motion for judgment which brought the merits of the litigation before Judge Duffy. If anyone had the obligation to bring to the court's attention that the class action aspects of the case still were undetermined, it was the defendants who moved on the merits before the motion for class certification was determined. Plaintiff's cross-motion was filed only in response to the defendants' motion. At that time of filing the cross-motion, counsel for plaintiff requested oral argument which was not granted. Prior to Judge Duffy rendering his decision, plaintiff had no knowledge that Judge Duffy was going to determine the class action motion in connection with the motions and cross-motion for summary judgment. Finally, it should not have been necessary for either plaintiff or defendants to bring to Judge Duffy's attention that judgment could not be entered against the class without

giving notice to the class, as it has long been the law in this Circuit that notice to the members of a class is a requirement of due process, see <a href="Eisen v.Carlisle">Eisen v.Carlisle</a> and <a href="Jacqueline">Jacqueline</a>, 391 F. 2d 555, 564 (2d Cir.1968).

Judge Duffy finally directed that notice be given to the members of the class of his decision after it had been rendered, with them then having an opportunity to come in and make application for redetermination (134a). With Judge Duffy already committed to his decision, it would indeed be a strange member of the class who would hold out any hope for relief by a further motion before Judge Duffy. It is for this reason that the one member of the class who did subsequently appear is seeking relief only on this appeal (222a). Under these circumstances, the imposition of the costs of the giving of the notice upon the plaintiff was but an added penalty on the plaintiff imposed by Judge Duffy. However, plaintiff has given this notice although seriously questioning whether the giving of notice "after the fact", as directed by Judge Duffy, truly meets the requirements of due process of law with

respect to the rights of the members of the class.

Whether the confusion previously related in the Statement of Facts, which occurred with respect to the entering of orders \* is attributable to bias or merely inadvertence, the fact remains that the manner in which the orders were entered forced the plaintiff to travel a long, hard and expensive trail in preserving his right to appeal. However, the trail has been traveled and plaintiff is finally before this Court. He seeks relief not only on the merits of the litigation but in the vindication of his good name and professional reputation. It is submitted that the facts demonstrate his entitlement to that relief, that the decision below should be reversed not only for the reasons heretofore stated, but also because the decision is tainted by the manifest bias of Judge Duffy against the plaintiff, that this Court should include in its opinion the Disciplinary Board finding that Mr. Lowenschuss was not guilty of any unprofessional conduct, and that on remand the case be assigned to a Judge other than Judge Duffy.

<sup>\*</sup>Three separate final orders were filed (155a, 161a, 214a).

## CONCLUSION

For all the foregoing reasons it is respectfully submitted that the decision below granting summary judgment in favor of defendants should be reversed, that the denial of plaintiff's motion for summary judgment should be reversed and summary judgment entered in favor of plaintiff, that the decision below should be reversed for failing to consider the claims of plaintiff and the members of the class under the securities law, and that the unwarranted criticism of Mr. Lowenschuss by the court below should be corrected.

Respectfully submitted,

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## US COURT OF APPEALS: SECOND DCIRCUIT

Indez No.

LOWENSCHUSS, et al.
Plaintiff-Appellants m

against

JAB KANE, et al, Defnendate-Appellees Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

**NEW YORK** 

...

I, James Steele,

being duly swom,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York
That on the // day of November, 1974 at

deponent served the annexed

appellant's Brig

upon

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attornev(s) herein,

Swom to before me, this //

day of november

19 74

JAMES STEELE

\* Abrah

\* Milton Paulson-122 E. 42nd St., New York

\* Simpson, Thacher, & Bariett- | Battery Park Pl.

\* Sallivan & Cromwell- 48 Wall St.

ROBERT T. BRIN NOTARY PUBLIC, STATE OF NEW YORK

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